

Supreme Court

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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1470

BOB JONES UNIVERSITY,

Petitioner,

v.

GEORGE P. SHULTZ, SECRETARY OF THE
TREASURY, ET AL.

Respondents.

ON WRIT OF CERTORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

DOCKETED APRIL 30, 1973
PETITION FOR CERTORARI GRANTED OCTOBER 9, 1973

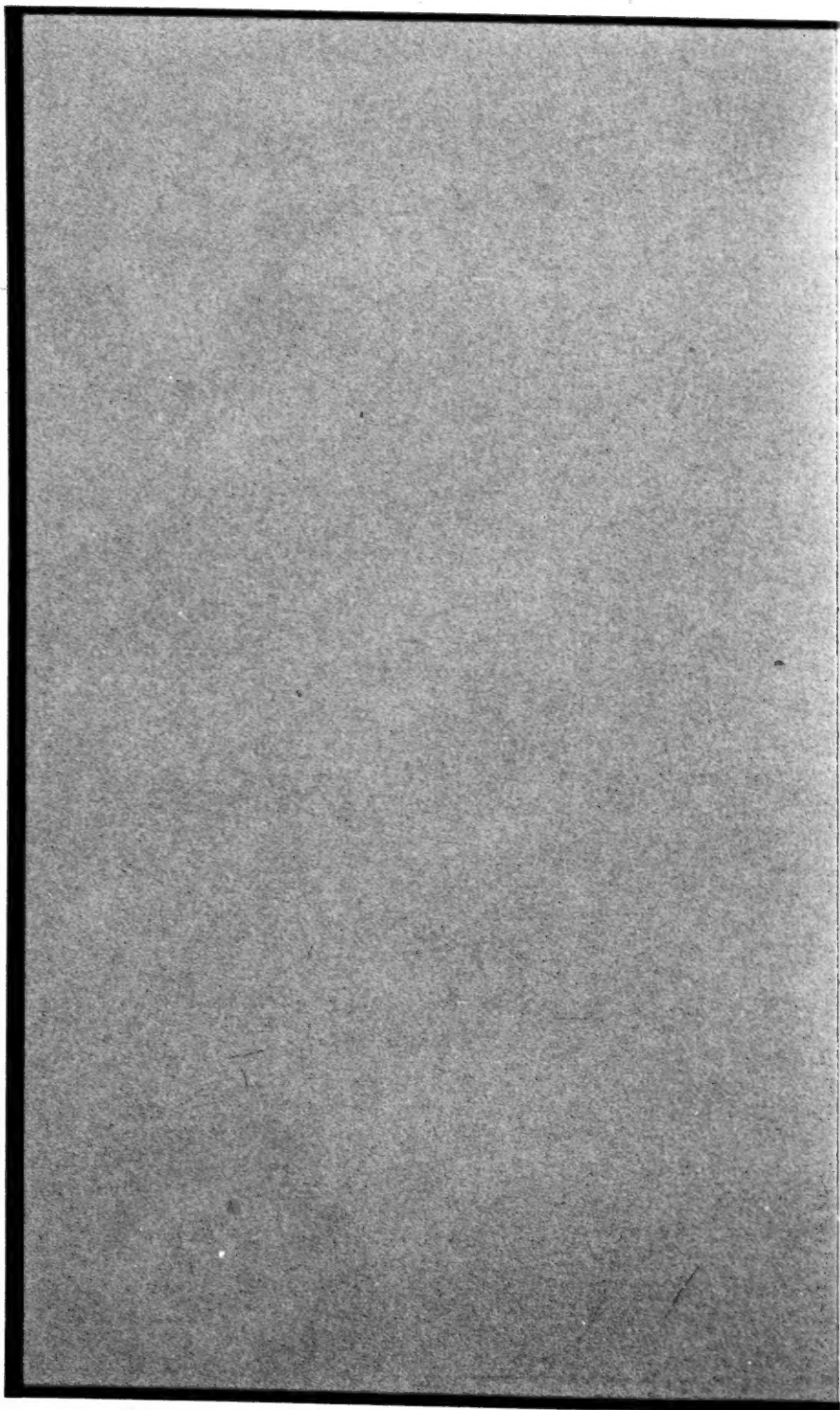
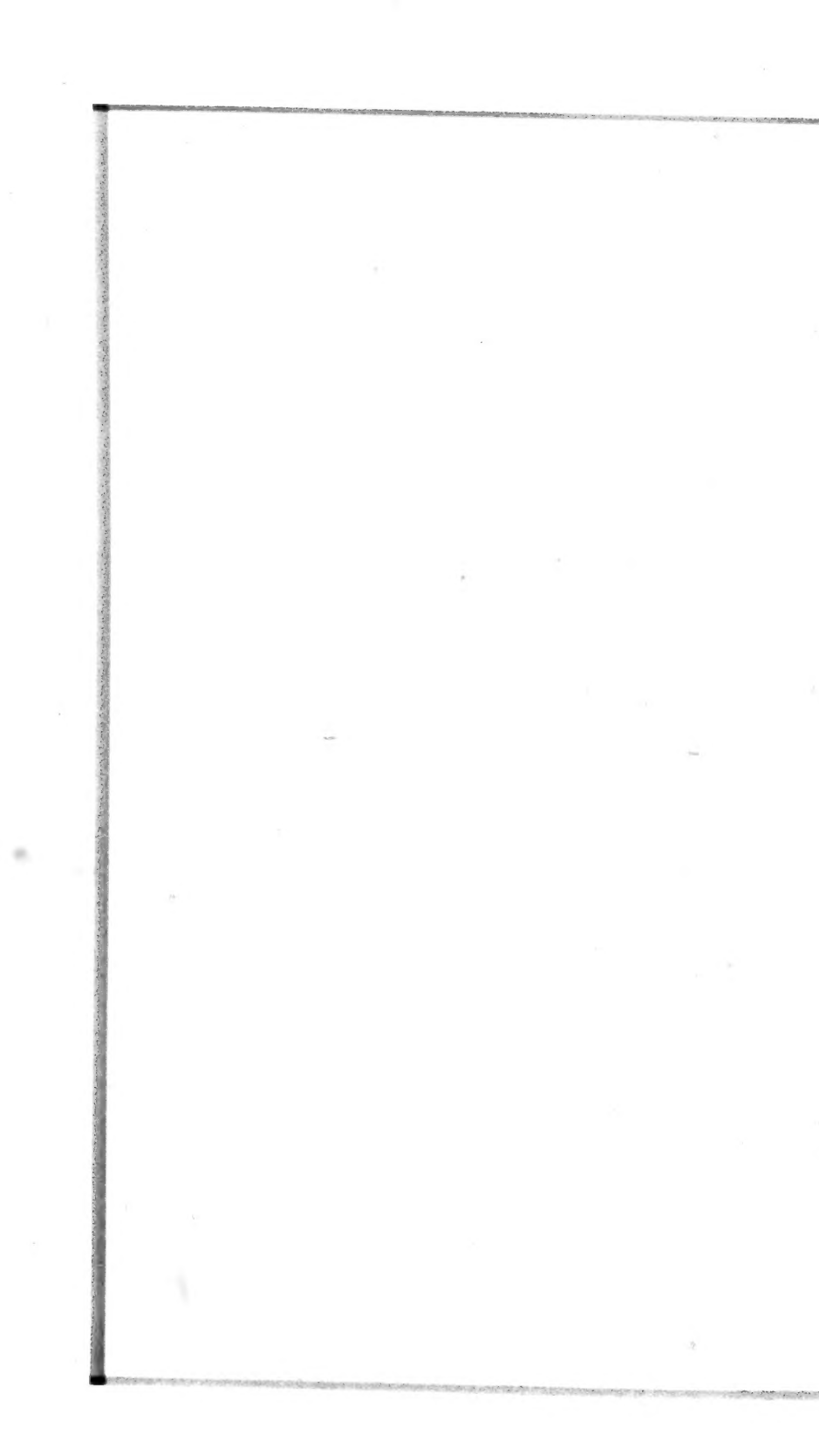


TABLE OF CONTENTS

	Page
Docket Entries	A-1
Complaint	A-4
Motion for Temporary Restraining Order and Preliminary Injunction	A-8
Affidavit of Dr. R. K. Johnson in Support of Motion for Preliminary Injunction	A-9
Letter dated March 30, 1951, from U. S. Treasury Department to Bob Jones University, Inc., Greenville, S. C.	A-12
Affidavit of Dr. Bob Jones, III, in Support of Motion for Preliminary Injunction	A-14
Purpose Clause from Certificate of Incorporation of Bob Jones University by the Secretary of State of South Carolina No. 3926, dated November 20, 1952	A-15
Purpose Clause from Amendment to Charter of Bob Jones University dated January 25, 1960	A-18
Pamphlet entitled: Is Segregation Scriptural? by Dr. Bob Jones, Sr.	A-19
Letter dated November 30, 1970, from District Director, Internal Revenue Service, to Bob Jones University, Inc., Greenville, S. C.	A-37
News Release from Internal Revenue Service, July 10, 1970	A-39
News Release from Internal Revenue Service, July 19, 1970	A-40
Affidavit of John E. Fowler in Support of Motion for Preliminary Injunction	A-42
Affidavit of Bob Jones, Jr., in Support of Motion for Preliminary Injunction	A-45
Affidavit of Wesley M. Walker	A-46

Affidavit of Fletcher C. Mann	A-48
Motion to Dismiss	A-50
Affidavit of William H. Connett in Support of Motion to Dismiss	A-51
Exhibit C, Letter dated December 30, 1970, from Bob Jones University, Greenville, S. C., to District Director, Internal Revenue Service, Columbia, S. C.	A-56
Supplemental Affidavit of William H. Connett in Support of Motion to Dismiss	A-60
Exhibit D, Letter dated December 9, 1970, signed Bob Jones, President, Bob Jones University, Greenville, S. C.	A-60
Exhibit E, Letter dated September 10, 1971, from Bob Jones University, Greenville, S. C.	A-64
Affidavit of Florence Post in Support of Motion for Preliminary Injunction	A-65
Affidavit of Jo Ann Hatcher	A-67
Affidavit of Joe N. Cocke in Support of Motion for Preliminary Injunction	A-69
Letter dated January 12, 1971, from A. C. Ross, District Director of Internal Revenue Service, Atlanta, Ga., to Fayette Academy, Somerville, Tenn.	A-70
Affidavit of O. Jack Taylor, Jr., in Support of Motion for Preliminary Injunction	A-72
Letter dated April 23, 1971, from O. Jack Taylor, Jr., to C. B. Rogers, Staff Assistant, Office of Treasurer, Nationwide Foundation, Columbus, Ohio	A-73
Letter dated April 26, 1971, from George W. Schmidt, Columbus, Ohio, to O. Jack Taylor, Jr., Greenville, S. C.	A-74
Letter dated April 29, 1971, from O. Jack Taylor, Jr., to George W. Schmidt, Columbus, Ohio	A-75

Testimony before The Senate Select Committee on Equal Educational Opportunity by Randolph W. Thrower, Commissioner of Internal Revenue	A-76
Letter dated May 3, 1971, from George W. Schmidt, Columbus, Ohio, to O. Jack Taylor, Greenville, S. C.	A-91
Deposition of William H. Connett	A-93
Order of the United States District Court dated November 17, 1971 granting Motion for Preliminary Injunction	A-114
Answer	A-129
Notice of Appeal to the United States Court of Appeals for the Fourth Circuit	A-131
Opinion of the United States Court of Appeals for the Fourth Circuit decided January 19, 1973	A-132
Petition for Rehearing in the United States Court of Appeals for the Fourth Circuit	A-141
Order of the United States Court of Appeals for the Fourth Circuit denying Petition for Rehearing	A-150
Motion for Stay of Mandate in the United States Court of Appeals for the Fourth Circuit	A-152
Order of the United States Court of Appeals for the Fourth Circuit denying Motion for Stay of Mandate	A-153
Application for Stay of Mandate in the United States Supreme Court	A-153
Endorsement on Application for Stay of Mandate by Mr. Chief Justice Burger	A-156



A-1

DOCKET ENTRIES U. S. DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

C.A. 71-891 Bob Jones University vs. John B. Connally,
Sec., etc.

<i>Date</i>	<i>Filings—Proceedings</i>	
9-9-71	Complaint and Summons	(J.S. 5)
9-9-71	Motion for Temporary Restraining Order and preliminary injunction	
9-9-71	Affidavit of Dr. R. K. Johnson in Support of Motion.	
9-9-71	Affidavit of Dr. Bob Jones III, in Support of Motion.	
9-9-71	Affidavit of John E. Fowler in support of Motion.	
9-9-71	Affidavit of Bob Jones, Jr., in support of Motion.	
9-10-71	Plaintiff's Certificate pursuant to Rule 65 (b) of the Federal Rules of Civil Procedure.	
9-10-71	Hearing (CES, Jr.) Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order.—No opinion handed down. Case is to be tried on these motions on October 4, 1971, at 11:00 A.M. in Greenville, S. C.	
9-13-71	Plaintiff's Notice of Motion for Temporary Restraining Order and Preliminary Injunction Hearing Oct. 4, 1971 at 11:00 A.M. (copies delivered to Marshal for service)	
9-13-71	U.S. M. Return on Complaint and Motion—U.S. Attorney General served by certified mail 9-13-71; U.S. Dist. Attorney served in Columbia 9/13/71.	
9-13-71	Ret. USM on Complaint and Motion—John B. Connally, Sec. of Treasury, etc., served by certified mail on 9-13-71. (#344886)	

A-2

- 9-13-71 Ret. USM on Complaint and Motions—Johnnie M. Walters, Commissioner of IRS served by certified mail on 9-13-71 #344884.
- 9-16-71 Ret. USM on Notice—John B. Connally, Sec. of Treas., served by certified mail 9-15-71, #981260; Johnnie M. Walters, Com. of IRS served by certified mail 9-15-71 #981263; U.S. Atty. Gen. served by certified mail 9-15-71 #981261; U.S. Dist. Atty., served in Columbia 9/15/71.
- 9-21-71 Plaintiff's Motion for leave to take depositions pursuant to Rule 30(a) FRCP.
- 9-21-71 Affidavit of Wesley M. Walker in support of Motion to take depositions.
- 9-21-71 Affidavit of Fletcher C. Mann.
- 9-27-71 Defendants' Motion to Dismiss.
- 9-28-71 Defendants' Opposition to Plaintiff's Motion for Leave to Take Depositions, with support Memorandum.
- 9-28-71 Affidavit of William H. Connett in support of Defendants' Motion to Dismiss, with support Memorandum.
- 9-28-71 Certificate certifying that counsel are unable to dispose of issues involved in Defendants' Motion to Dismiss.
- 9-28-71 Order (CES jr) directing that there is no necessity to take deposition of Johnnie M. Walters, but directing that deposition of Wm. H. Connett, Asst. to Commissioner of Internal Revenue may be taken with reference to whether or not a decision has been reached on the Washington level as to the revocation of the tax exempt status of the plaintiff.
- 9-30-71 Plaintiff's Motion to Produce.

A-3

- 10-1-71 13 Affidavits, in Support of plaintiff's Motion for Preliminary Injunction as follows:
Mrs. J. W. Stewart, Charles Loving, Arnold Fletcher Anderson, Charles Baldwin, John McLario, A. L. Hayes, Evelyn Coffman, Florence Post, Paul W. Doll, Jr., Martin H. Bartlett, Jo Ann Hatcher, Joe N. Cocke, and O. Jack Taylor, Jr.
- 10-4-71 Defendant's Opposition to Request to Produce.
- 10-4-71 HEARING (CESjr) on plaintiff's Motion for preliminary injunction and defendants' Motion to Dismiss. Taken under advisement, proposed Orders to be submitted to the Court within 15 days, also counsel may file additional affidavits within 1 week.
- 10-5-71 Deposition of William H. Connett.
- 10-19-71 Received proposed Findings of Fact and Conclusions of law together with Affidavit in support of Defendants' Motion to Dismiss.
- 10-26-71 Affidavit in Support of Motion for Preliminary Injunction.
- 11-17-71 Order (CES, Jr.) that the Defendant's Motion be denied and that the Defendants are enjoined from revoking or threatening to revoke the tax exempt status of Plaintiff and further enjoined advanced assurance deductibility of contributions solely because of the admissions policy of Plaintiff pending a final hearing and determination of this cause on the merits. Copy of Order to counsel.
- 12-27-71 Answer
- 12-14-72 Defendant's Notice of Appeal.
- 1-18-72 Record & Deposition to Clerk, Fourth Circuit Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BOB JONES UNIVERSITY,
Plaintiff,

vs.

JOHN B. CONNALLY, SECRETARY
OF THE TREASURY OF THE
UNITED STATES AND JOHNNIE M.
WALTERS, COMMISSIONER OF
INTERNAL REVENUE,
Defendants.

COMPLAINT

Civil Action No. 71-891

The Plaintiff would respectfully show:

I

This action is for preliminary and permanent injunctive relief enjoining the Defendants from revoking or threatening to revoke the tax exempt status of Plaintiff solely because of the Plaintiff's admissions policy.

II

This action arises under the Constitution of the United states, the First and Fifth Amendments thereto, and the Internal Revenue Code of 1954. The matter in controversy exceeds, exclusive of interest and cost, the sum of \$10,000. This Court has jurisdiction of this action under 28 U.S.C. Sections 1331, 1340, 1343 and 1361.

III

The Defendant, John B. Connally, is Secretary of the Treasury of the United States. The Defendant, Johnnie M. Walters, is Commissioner of Internal Revenue.

A-5

IV

The Plaintiff is an eleemosynary corporation created under the laws of the State of South Carolina, engaged in religious and educational activities in Greenville, South Carolina. The Plaintiff is a private religious school, organized and operated exclusively for charitable, religious and educational purposes and is presently an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954, and has been declared so by virtue of an advance determination letter issued by the Defendants' predecessors in office.

V

Since its foundation and for a period in excess of forty (40) years, Plaintiff has consistently adhered to certain religious beliefs and practices among which is the belief that God set up racial barriers and that the mixing of the races is contrary to the teachings of the Bible.

VI

Based upon the religious beliefs upon which it was founded and has been continuously operated, Plaintiff has adopted an admissions policy which excludes admission of members of the Negro race.

VII

Heretofore, the Defendants published certain policies, statements or news releases stating that the tax exempt status of private schools including religious schools such as Plaintiff would be revoked if such schools, including Plaintiff, did not adopt racially non-discriminatory admissions policies.

VIII

By letter dated November 30, 1970, Defendants, acting by and through the District Director of Internal Revenue, have stated that the tax exempt status of Plaintiff will be revoked and its advance determination letter withdrawn unless Plaintiff establishes and maintains a racially non-dis-

criminary admissions policy contrary to the religious beliefs and practices upon which Plaintiff was founded and has been continuously operated.

IX

If the tax exempt status of the Plaintiff is revoked as threatened, the Plaintiff will suffer irreparable harm and damage for which there is no adequate remedy at law in that:

(a) Plaintiff will be forced to employ accountants and other personnel at substantial cost in order to prepare and file any required tax returns with the Internal Revenue Service, resulting in disruption of its organization and operation.

(b) Plaintiff will be subject to substantial tax liability in excess of \$10,000 which would seriously deplete its funds and jeopardize its continued operation.

(c) Donations and gifts to Plaintiff, upon which Plaintiff relies, from various persons, firms and corporations would be eliminated or curtailed due to their inability to deduct said donations and gifts in computing their tax liability under the Internal Revenue Code of 1954. Plaintiff, without said gifts and donations, would be unable to continue its programs, and its funds would be seriously depleted and its continued operation threatened.

X

The Defendants' action, as threatened by said letter of November 30, 1970, is unlawful in that it exceeds the authority vested in the Defendants by the Internal Revenue Code of 1954.

XI

The Defendants' action as threatened by said letter of November 30, 1970, is contrary to the provisions of 501(c) (3) of the Internal Revenue Code of 1954 in that said provisions set forth certain criteria for exempt status, none of which involve the admissions policies of exempt organizations carrying out educational and religious activities.

A-7

XII

The Defendants' action, as threatened by said letter of November 30, 1970, is in violation of the First Amendment to the Constitution of the United States in that it would deprive Plaintiff of the right to the free exercise of its religious beliefs.

XIII

The Defendants' action, as threatened by said letter of November 30, 1970, is in violation of the First Amendment to the Constitution of the United States in that it would promote, benefit and establish those religions believing in the mixing of the races.

XIV

The Defendants' action, as threatened by said letter of November 30, 1970, is in violation of the Fifth Amendment to the Constitution of the United States in that it would deny Plaintiff due process and equal protection of the law.

XV

The Defendants' action, as threatened by said letter of November 30, 1970, is in violation of the First Amendment to the Constitution of the United States in that it would deprive Plaintiff of its right to express and practice its beliefs by conducting and sponsoring the peaceful assembly and association of those who share its beliefs.

XVI

The Defendants' action, as threatened by said letter of November 30, 1970, is unlawful and in violation of the Constitution of the United States in that it constitutes an attempt to exercise legislative power by the executive branch.

Wherefore, Plaintiff prays that this Court issue its preliminary and permanent injunction enjoining Defendants, their agents, servants, deputies, employees and successors in office from revoking or threatening to revoke the tax exempt status of Plaintiff solely because of its admission policy.

(Signatures and Verification omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

CIVIL ACTION NO. 71-891

Upon the verified Complaint and the Affidavits of Dr. Bob Jones, Jr., Dr. Bob Jones, III, Dr. R. K. Johnson and John E. Fowler, annexed hereto, the Plaintiff moves the Court as follows:

(1) To issue a temporary restraining Order restraining the Defendants from revoking the tax exempt status of Plaintiff and withdrawing the advanced determination letter of exempt status heretofore issued by the Defendants' predecessors in office as specified in the Complaint herein, pending the hearing upon the issuance of the preliminary injunction sought hereinafter in this Motion and the determination thereof.

(2) To issue a preliminary injunction enjoining the Defendants from revoking the tax exempt status of the Plaintiff and withdrawing the advanced determination letter issued by the Defendants' predecessors in office which is specified in the Complaint herein pending the final hearing and determination of this cause.

The grounds of this Motion as more fully set forth in the Complaint and the annexed Affidavits are that:

(a) The threatened action of the Defendants is illegal and in violation of the Constitution of the United States and the First and Fifth Amendments thereto;

(b) The Defendants unless enjoined will revoke the tax exempt status of Plaintiff;

(c) The revocation of the tax exempt status of Plaintiff will cause immediate and irreparable injury to the Plaintiff;

(d) Unless the Defendants are enjoined and restrained pending final disposition of this action, the injury to the

Plaintiff in the interim will be irreparable even by final judgment for Plaintiff;

(e) No injury will be sustained by the Defendants or by the public through the issuance of a temporary restraining Order or preliminary injunction.

(Signatures and Verification omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

AFFIDAVIT IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

CIVIL ACTION NO. 71-891

State of South Carolina
County of Greenville

Personally appeared before me Dr. R. K. Johnson, who first being duly sworn states and deposes:

I am Secretary-Treasurer and Business Manager of Bob Jones University, Plaintiff in the above captioned action. I am thoroughly familiar with the religious beliefs and principles and operation of the Bob Jones University.

Bob Jones University was founded and has been continuously operated in accordance with fundamentalist religious beliefs and practices. Among these religious beliefs and practices is the belief that God has ordained the separation of the races and that it is contrary to the principle of the Word of God for members of different races to marry each other. Based upon these religious beliefs and practices, Bob Jones University has adopted an admissions policy which excludes the admission of members of the Negro race.

Bob Jones University depends upon gifts and donations and income from its operations to support its continued operation and growth. I am informed and believe that if the tax exempt status of Bob Jones University is revoked as

threatened by Defendants, that substantial sums will be payable by the University to the United States Government in income taxes as well as other taxes imposed by the Federal Government. In addition, I am informed and believe that contributions to the University from various persons, firms, foundations, trusts, and corporations will be surely curtailed and perhaps eliminated if the tax exempt status of Bob Jones University is revoked.

The net result of revocation of the University's tax exempt status will be that funds which would otherwise be used for its operation and growth would be expended in the payment of Federal taxes or would not be received from potential donors.

If the University's funds are curtailed or restricted, it will be necessary for the University to review its tuition and fee schedule. I am informed and believe that it will be necessary for the University to increase tuition and fees and that such increase in tuition and fees will result in many students being unable to afford to attend Bob Jones University, thus, restricting its student body and threatening its continued operation.

If the funds of the University are restricted or curtailed, the University will be required to re-examine its scholarship help program. I am informed and believe that in such event the University will be forced to restrict its scholarship help program, both in the number of scholarships granted and in the amount of each scholarship. To thus restrict the scholarship help program of Bob Jones University will result in a reduction in the number of members of its student body thus threatening its continued operation.

Bob Jones University employs a faculty and staff of approximately 650 persons. These persons are employed at salaries substantially below those paid by other educational institutions. There is an implied understanding between the University and members of its faculty and staff which has been consistently adhered to and honored by Bob Jones University that Bob Jones University will provide retirement

benefits including housing and medical care to members of the University's faculty and staff who reach retirement age. If the funds of Bob Jones University are restricted or curtailed, it will be difficult to provide such retirement benefits to faculty and staff as they retire. If Bob Jones University is unable to provide such retirement benefits it will be difficult, if not impossible, for Bob Jones University to maintain its present faculty and staff and to recruit additional members of its faculty and staff. Any curtailment of the University's ability to provide such retirement benefits will, upon information and belief jeopardize its continued operation.

Bob Jones University has a building program which is dependent upon such funds. Presently, University dormitory space is inadequate to such an extent that three or four students are assigned to one room. In addition, library space is lacking to the extent that books must be stored in aisles and students are required to use other buildings because of inadequate facilities in the library reading room. I am informed and believe that if the University's tax exempt status is revoked that it will be difficult, if not impossible, to construct much needed library and dormitory facilities.

Bob Jones University presently has under construction an amphitorium, the total construction cost of which will be between two and one-half and three million dollars. I am informed and believe that if the University's tax exempt status is revoked as threatened, that the University may be unable to complete construction of this amphitorium. Should the University be unable to complete construction of this amphitorium, it would have expended large sums of money and not have received the benefit of the use of the amphitorium, all to its irreparable harm and damage.

Bob Jones University owns an apartment building known as Campus View by which it provides apartments to members of its faculty and staff, said apartment building is presently encumbered by a mortgage debt of approximately one million dollars. Bob Jones University depends upon gifts and contributions to pay the installments on said mortgage as they be-

come due. I am informed and believe that if the tax exempt status of Bob Jones University is revoked as threatened, that it would be difficult for the University to continue making said mortgage payments as they become due. In addition, the University has planned to add ten additional floors to said apartment building and has caused to be prepared and paid for blueprints and drawings for said addition. I am informed and believe that if the tax exempt status of Bob Jones University is revoked as threatened, that it will be impossible for the University to make such addition, all to the University's irreparable harm and damage.

Bob Jones University has been exempt from Federal income tax since its organization. By letter dated March 30, 1951, a copy of which is attached, Bob Jones University was notified by the Office of the Commissioner of Internal Revenue that it was an exempt organization. The character of Bob Jones University, the purpose for which it was organized and its method of operation have not changed since March 30, 1951, the date of said letter. Similar letters were received by Bob Jones University from the Internal Revenue Service prior to said letter of March 30, 1951.

(Signature and Jurat omitted)

Letterhead of U.S. Treasury Department
Washington, D.C.

Office of Commission of Internal Revenue

Bob Jones University, Inc.
c/o Robert K. Johnson
Greenville, South Carolina
Gentlemen:

It is the opinion of this office, based upon the evidence presented, that you are exempt from Federal income tax under the provisions of section 101(6) of the Internal Revenue Code

A-13

and corresponding provisions of prior revenue acts, as it is shown that you are organized and operated exclusively for educational purposes.

Accordingly, you will not be required to file income tax returns unless you change the character of your organization, the purposes for which you were organized, or your method of operation. Any such changes should be reported immediately to the collector of internal revenue for your district in order that their effect upon your exempt status may be determined.

Contributions made to you are deductible by the donors in computing their taxable net income in the manner and to the extent provided by section 23(o) and (q) of the Internal Revenue Code, as amended, and corresponding provisions of prior revenue acts.

Bequests, legacies, devises or transfers, to or for your use are deductible in computing the value of the net estate of a decedent for estate tax purposes in the manner and to the extent provided by sections 812(d) and 861(a) (3) of the Code and/or corresponding provisions of prior revenue acts. Gifts of property to you are deductible in computing net gifts for gift tax purposes in the manner and to the extent provided in section 1004(a) (2) (B) and 1004(b) (2) and (3) of the Code and corresponding provisions of prior revenue acts.

It will not be necessary for you to file the annual return of information, Form 990A, generally required of organizations exempt under section 101 of the Internal Revenue Code, as you come within the specific exceptions contained in section 54(f) of the Code.

In the event you have not filed a waiver of exemption certificate in accordance with the provisions of section 1426 (1) of the Code, no liability is incurred by your organization for the taxes imposed under the Federal Insurance Contributions Act. Tax liability is not incurred by your organization

under the Federal Unemployment Tax Act by virtue of the provisions of section 1607(c) (8) of such Act.

The collector of internal revenue for your district is being advised of this action.

This ruling affirms Bureau ruling of April 30, 1942 addressed to you under your former name, Bob Jones College, holding you exempt from Federal income tax under the provisions of section 101(6) of the Internal Revenue Code and corresponding provisions of prior revenue acts.

By direction of the Commissioner.

(Signature omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

State of South Carolina
County of Greenville

Personally appeared before me Dr. Bob Jones, III, who first being duly sworn, states and deposes:

I am President of Bob Jones University and as such I am thoroughly familiar with the beliefs, operations, and history of Bob Jones University.

Bob Jones University was founded as Bob Jones College near Panama City, Florida in 1926. Bob Jones University was not founded for the purpose of avoiding or allowing others to avoid court ordered integration. Bob Jones University has not been operated and is not operated for the purpose of allowing anyone to avoid the effects of integration, whether court ordered or otherwise.

Bob Jones University was founded as a fundamentalist, religious school as set forth in the original purpose and creed

of the University which has remained unchanged since its founding. This purpose and creed is as follows:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures; combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; his identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

This purpose and creed serves as the purpose clause of the University's charter today. The University charter, a copy of which is attached, has been amended only once. Such amendment provides that the charter and creed may never be again amended.

One of the ethics which I believe to be revealed in the Holy Scriptures and referred to in the University creed and charter is that God has set bounds of habitation for the nations or races of the world. My religious beliefs and those of the University prohibit any action or policy which would violate these religious beliefs and practices by tending to break down these boundaries which I believe God has erected.

Bob Jones University is committed to acting in accordance with its religious beliefs and creed. I believe that if the University were to act contrary to its stated religious beliefs and principles, that these religious beliefs and principles

would be for all purposes destroyed and that the University's purpose as stated in its creed and charter of promoting these religious beliefs and practices through its educational activities would be destroyed.

I believe that God set up barriers between the races and that God has ordained the separation of the races and that it is contrary to the principles of the Word of God for individuals of different races to marry each other. I further believe that to promote such inter-marriage or to provide conditions under which such inter-marriage is more likely to occur is contrary to the Word of God. I further believe that if Bob Jones University were to admit members of the Negro race that the University would be promoting such inter-marriage and would be providing conditions under which such inter-marriage is more likely to occur contrary to the religious beliefs and practices upon which the University was founded and has been continuously operated.

These beliefs and practices of the University are more fully set forth in the booklet "Is Segregation Scriptural", a transcription of a radio address made by the founder of Bob Jones University, my Grandfather, Dr. Bob Jones, on April 17, 1960, a copy of which is attached hereto and incorporated herein.

I am informed and believe that other religions adhere to beliefs and practices which promote the mixing and inter-marriage of the races. I believe that such religions and their beliefs and practices are contrary to the principles of the Word of God which Bob Jones University is committed to uphold. I am informed and believe that the Defendants have not and will not threaten to revoke the tax exempt status of such religions or religious and educational institutions operated by such religions.

In furtherance of its religious beliefs and principles, Bob Jones University had adopted and enforced a rule prohibiting its students from dating or marrying members of another race, whether students or not. Violation of this rule results in expulsion from the University.

I am informed and believe that there are certain organizations in existence in the United States and within the State of South Carolina which advocate and actively promote the mixing of the Negro and Caucasian race. I believe that these organizations and persons in concert with them would actively seek to subvert the University's rule and policy of prohibiting its students from dating members of another race should Negroes be permitted to attend Bob Jones University.

The majority of young people date and marry those with whom they are associated at institutions of higher learning such as Bob Jones University. I believe it would be impossible to enforce the University's prohibition against inter-racial dating and marriage if the University adopted a racially non-discriminatory admissions policy.

Bob Jones University presently enrolls approximately 4,500 students and employs approximately 650 on its faculty and staff and carries on its religious and educational activities on its campus valued at approximately 30 million dollars, located in Greenville, South Carolina.

Bob Jones University requires all students to attend daily chapel services at which the religious views and principles of the University are taught. All classes and meetings held under University sponsorship are begun and ended with prayer. All students are required to take courses in religion. All University buildings and classrooms bear religious pictures and plaques.

All faculty members of the University are required to teach and upon information and belief all adhere to the religious beliefs and principles of the school. Any member of the faculty or member of the student body teaching or promoting religious beliefs contrary to the beliefs of the University is subject to expulsion or dismissal.

Religious instruction and training is required of all students at Bob Jones University. Required courses for the Bachelor of Art Degree and the Bachelor of Science Degree include ten semester hours of Bible. The University bulletins state: "A course in Bible must be elected each semester by

all students. Exceptions may be made only in the case of students who have completed a concentration in one of the fields of this school."

The admissions standards of Bob Jones University relate not only to academic achievement but include standards relating to applicant's religious convictions. No atheist or agnostic is considered for admission.

Bob Jones University does not accept Federal or state grants in aid or participate in any program financed by the Federal government or any state government. The University has refused to participate or be a part of such programs because, inter alia, to do so the University would be required to adopt a racially non-discriminatory admissions policy, contrary to the University's religious beliefs and practices.

Bob Jones University is known as the "world's most unusual University." I believe that in large measure Bob Jones University is the world's most unusual University, and unique among fundamentalist religious training. I know of no other educational institution in the United States which offers educational and religious instruction as does Bob Jones University.

In December of 1970, Bob Jones University received from the District Director of Internal Revenue in Columbia, South Carolina, a letter with enclosures, copies of which are attached, stating that Bob Jones University is not entitled to tax exempt status under the Internal Revenue Code if it discriminates on the basis of race in its admission of students. I am informed and believe that if not restrained, the Defendants will revoke the tax exempt status of Bob Jones University.

(Signature and Jurat omitted)

PURPOSE CLAUSE FROM CHARTER OF BOB JONES UNIVERSITY

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of cul-

ture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures; combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; his identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

IS SEGREGATION SCRIPTURAL?

ADDRESS GIVEN OVER
RADIO STATION WMUU,
BOB JONES UNIVERSITY,

GREENVILLE, SOUTH CAROLINA,
APRIL 17, 1960

(This address was mechanically recorded and has not been edited.)

My friends, I am going to bring you today one of the most important and most timely messages I have ever brought. I hope you will sit close to the radio. Do not let anything disturb you. I want you to hear this message through.

Now, we folks at Bob Jones University believe that whatever the Bible says is so, and we believe it says certain fundamental things that all Bible-believing Christians accept; but when the Bible speaks clearly about any subject that settles it. Men do not always agree, because some people are dumb — some people are spiritually dumb; but when the

Bible is clear, there is not any reason why everybody should not accept it.

The Bible makes some things plain. It makes it plain how to be saved. We are saved by grace through faith in the atoning blood of Christ. The Bible makes it plain that man is naturally a sinner and that he has to become supernaturally a Christian — born again.

All orthodox, Bible-believing Christians agree on one thing; and that is, that whatever the Bible says is so. When they had old religious debates, they used to get together and say, "Well, we will discuss this subject." One man would say, "The Bible says this," and another man would say, "You are mistaken. It says this." They argued about what the Bible said. They agreed that whatever it said was so, but they argued about what it said.

In recent years there has been a subtle, Satanic effort to undermine people's faith in the Bible; and the devil has led the race along until men have put their own opinion above the Word of God. You will find that practically all the troubles we are having today have come out of the fact that men in many instances have ceased to believe in an authoritative Bible.

For instance, we are living in the midst of race turmoil all over the world today. Look at what they are facing in Africa, and look at what we are facing in this country. It is all contrary to Scripture — it is all contrary to the Word of God. I am going to show you that the Bible is perfectly clear on races — just as clear as it can be.

People come along and say, "Well, God is the Father of everybody." No, He is not. God is the Father of born-again people. The Bible says this as clearly as it can be put in language. We are children of God by faith in Jesus Christ.

There is no trouble between a born-again white man and a born-again colored man or a born-again Chinese or a born-again Japanese. Born-again, Bible-believing Christians do not have trouble. They may not understand some things; but

when we give them the Word of God for it, they see it and understand it.

You know, we have gotten away from the Bible. Modern education came along and put the opinion of man above the Word of God, and man has come along and tried to give us an explanation. All you have to do is live up to the Word of God and you will have no trouble about knowing how to meet life's problems.

What does God teach about the races of the world? If you will go to the seventeenth chapter of the Acts of the Apostles, you will find where Paul preached a special sermon on Mars Hill. Remember now, Athens was the center of culture. There are still fragments of the Athenian culture today in the museums over there; and you can walk around among the crumbled ruins. Paul was there. Paul was chosen of God (he was a Jew) to be the great apostle to the Gentiles. I think the greatest man who ever lived was Paul — I mean I think he was greater than Moses and greater than any other man who ever lived. Of course, I am not talking about the Lord Jesus Christ Who was God-Man. But to my mind, no other mere human ever reached the height of greatness that Paul reached. He was honored as God never honored any other man. He suffered as few men have ever had to suffer. He was misunderstood; but, oh, what a man he was.

Paul tells us in his sermon on Mars Hill, "God that made the world and all things therein, seeing that he is Lord of heaven and earth, dwelleth not in temples made with hands." Now, the statue of the Grecian goddess, Athena, was in the Parthenon; and Paul said that God did not dwell in buildings made with hands. "Neither is worshipped with men's hands, as though he needed any thing, seeing he giveth to all life, and breath, and all things."

Now, notice — this is an important verse — the twenty-sixth verse of the seventeenth chapter of the Acts of the Apostles, "And hath made of one blood all nations of men for to dwell on all the face of the earth" (in some of the best original manuscripts, the word "blood" is not there; but it is not important anyhow, because the thoughts are the

same.) "And hath made of one blood all nations of men for to dwell on all the face of the earth. . . ." But do not stop there," . . . and hath determined the times before appointed, and the bounds of their habitation." Now, what does that say? That says that God Almighty fixed the bounds of their habitation. That is as clear as anything that was ever said.

If you have a legal document and there is a paragraph that is clear and you come across an obscure passage, you interpret the obscure passage in the light of the clear passage. Any lawyer will tell you that. If he has a case in court, he will say, "Now, gentlemen of the jury, here is what this paragraph says. This one paragraph is not quite clear, but this other paragraph is clear; and we will interpret this in the light of the clear passage."

God Almighty did not make of the human race one race in the sense that He did not fix the bounds of their habitation. That is perfectly clear. It is no accident that most Chinese are in China. There has been an overflow in the world, but most Chinese live in China. There are millions and millions of them there, and there are no greater people in the world. I have never known lovelier and more wonderful people than the Chinese.

We were over in Formosa a few years ago and conferred an honorary degree on Generalissimo Chiang Kai-shek, and I never met a greater man. I never met a man of more intelligence or a more wonderful Christian; and Madame Chiang Kai-shek is a wonderful woman. There they are. Now, what happened? They married each other. She was a Christian Chinese woman educated in America. When she finished her education, she went back to her home in China. How God has used Generalissimo and Madame Chiang Kai-shek — not only as Christian witnesses but also in other ways. I was never with a man who pulled me to him with stronger ties than Generalissimo Chiang Kai-shek when I was over there and conferred an honorary degree on him. All right, he is a Chinese. He married a Chinese woman. That is the way God meant it to be.

Paul said that God "... hath made of one blood all nations of men. . . ." But He also fixed the bounds of their habitation. When nations break out of their boundaries and begin to do things contrary to the purpose of God and the directive will of God, they have trouble. The world is in turmoil today because men and nations go contrary to the clear teaching of the Word of God. Let's understand that. The Chinese people are wonderful people. They have internal troubles, of course, because Communism has gone into China and disturbed a great deal of the population. But the Chinese people are wonderful people. The Japanese people are ingenious — they are wonderful people. The Koreans are wonderful people. The Africans are wonderful people. In many ways, there are no people in the world finer than the colored people who were brought over here in slavery in days gone by.

You talk about a superior race and an inferior race and all that kind of situation. Wait a minute. No race is inferior in the will of God. Get that clear. If a race is in the will of God, it is not inferior. It is a superior race. You cannot be superior to another race if your race is in the will of God and the other race is in the will of God. But the purposes of these races were established by Almighty God; and when man attempts to run contrary to the directive will of God for this world, there is always trouble. Now, that is the trouble.

What happened? Well, away back yonder our forefathers went over to Africa and brought the colored people back and sold them into slavery. That was wrong. But God overruled. When they came over here, many of them did not know the Bible and did not know about Jesus Christ; but they got converted. Some of the greatest preachers the world has ever known were colored preachers who were converted in slavery days. John Jasper was one of them. One of the greatest preachers who ever stood before an American audience was John Jasper. And Sam Jones, years ago down in Georgia, told us about an old, colored preacher down there. He said, "There

is no man who ever stood on two legs who could preach like him."

God Almighty allowed these colored people to be turned here into the South and overruled what happened, and then He turned the colored people in the South into wonderful Christian people. For many years we have lived together. Occasionally there will be a flare-up. But the white people have helped the colored people build their churches, and we have gotten along together harmoniously and peacefully; and everything has come along fine. Sometimes we have a little trouble, but then we adjust everything sensibly and get back to the established order. But the good white folks have always stood by their good colored friends, and the good colored folks have always stood by their good white friends. No two races ever lived as close together as the white people and the colored people here in the South and got along so well.

Now, what is the matter? There is an effort today to disturb the established order. Wait a minute. Listen, I am talking straight to you. White folks and colored folks, you listen to me. You cannot run over God's plan and God's established order without having trouble. God never meant to have one race. It was not His purpose at all. God has a purpose for each race. God Almighty may have overruled and permitted the slaves to come over to America so that the colored people could be the great missionaries to the Africans. They could have been. The white people in America would have helped pay their way over there. By the hundreds and hundreds they could have gone back to Africa and got the Africans converted after the slavery days were over.

All right, now what is happening? Down in Africa there is trouble and turmoil. There is racial disturbance all over the world, and it is not of God. The Bible is clear on this. When people come along and say, "Well, God is the Father of everybody," they are wrong. He is not the Father of everybody. That is not in the Bible. That is a Satanic lie. Let me repeat, the Bible says as clearly as language can put it that people are children of God by faith in Jesus Christ. We are

children of God by faith in Jesus Christ. That is what the Bible says. Let's take the Word of God and quit slandering the Word of God. We are children of God by faith in Jesus Christ. A born-again white man and a born-again colored man can settle any differences they have. God is their Father. They are children of God by faith in Jesus Christ.

Individually, Christian people in the South — white and black — through the years have been able to work together and to understand each other. But now a world of outside agitation has been started, and people are coming in the name of piety, but it is a false piety, and are endeavoring to disturb God's established order; and we are having turmoil all over America. This disturbing movement is not of God. It is not in line with the Bible. It is Satanic. Now, listen and understand this. Do not let people lead you astray.

"Well," you say, "The colored folks have not been treated right." I agree with you. Neither have the poor white people been treated right. When I was a boy in Southeast Alabama, we lived in what was called the white section of the State. There were not many colored people there. The slaves were in the western part and in the midsection of the State. Down in Southeast Alabama there were some slaves but not many; but they had the reconstruction days — hard days — and the time came along when people were having a hard time. Some white folks were not treated right. They paid 20 per cent interest on money. They were oppressed by people who had money. The colored people down in my country were treated just as well as the white people by businessmen. Any man who would mistreat a colored man would mistreat a white man. If he is mean enough to mistreat one man, he is mean enough to mistreat another.

You can go to any city in the country and find the poor people living in a certain section there. I do not say that things are right. But things are not going to be made right by trying to overthrow God's established order. That is not the way to make things right. You cannot make them right that way. The colored people in the South today are better

off than they are anywhere else in the world. The situation is not a perfect situation for the white folks or the colored folks or for anybody else; but we have never had a perfect situation in this world since Adam and Eve disobeyed God in the Garden of Eden.

I want you folks to listen — you white and you colored folks. Do not let these Satanic propagandists fool you. This agitation is not of God. It is of the devil. Do not let people slander God Almighty. God made it plain. God meant for Christian people to treat each other right. If you are a Christian white person or a Christian colored person, you will treat each other right. We Christians are children of God by faith in Jesus Christ. We are one in Christ; but let us remember that the God Who made of one blood all nations also fixed the boundaries of their habitations.

Yes, Paul said, "God . . . hath made of one blood all nations of men" All men, to whatever race they may belong, have immortal souls; but all men have mortal bodies, and God fixed the boundaries of the races of the world. Let me repeat that it is no accident that most of the Chinese live in China. It is not an accident that most Japanese live in Japan; and the Africans should have been left in Africa, and the Gospel should have been taken to them as God commanded His people to do.

Wherever we have the races mixed up in large numbers, we have trouble. They have trouble in New York. They have trouble in San Francisco. They have had trouble all over California. Back in the old days when I was a young fellow, Captain Richmond Pearson Hobson went up and down this country and lectured on the "yellow peril" and told us we were going to have trouble with Japan. He said there would be a war with Japan someday. People said, "Oh, well, he is crazy." Other leaders went over this country and lectured on the "yellow peril" and the dangers we were facing. Remember, we did have a war with Japan.

The best friends we have in many ways are in the Orient. There are millions of Chinese over there. Dr. Grace Haight,

who used to be on our faculty and who was a missionary to China, told us that the Chinese were the best people in the world. Let me tell you something. When it comes to quality of races, all these races have quality. They have good qualities and bad qualities.

If we would just listen to the Word of God and not try to overthrow God's established order, we would not have any trouble. God never meant for America to be a melting pot to rub out the line between the nations. That was not God's purpose for this nation. When someone goes to overthrowing His established order and goes around preaching pious sermons about it, that makes me sick — for a man to stand up and preach pious sermons in this country and talk about rubbing out the line between the races — I say it makes me sick. I have had the sweetest fellowship with colored Christians, with yellow Christians, with red Christians, with all sorts of Christians — the sweetest fellowship anybody has ever had, we have had. Christians have always had it. We have never had any trouble about that.

The trouble today is a Satanic agitation striking back at God's established order. That is what is making trouble for us. Of course, it is easy to look back over the years and see the situation from another standpoint; but when the folks up North went to Africa and brought the slaves over to this country and sold them to the Southern people, the Southern people should have been Christian enough to have said, "We will not have any slaves. We are not going ahead." But, you know, they went ahead.

Only a small percentage of the Southern people held slaves. Only a small percentage of them were slave owners. A great many people in the South in the old days did not believe in slavery — they stood against slavery. But they went ahead, and the commercial element was dominant; and people brought slaves and sold them. This slavery was not right. It should not have been. What we should have done was to have sent missionaries to Africa. Yes, that is what we should have done. That would have been in line with Scripture.

God put the Africans over there. They are fine people. They are intelligent people. Do not think they are inferior in every way. It is not so. But we should have sent missionaries over there, and Africa should have been a great nation of colored Christians. If we had done what God had told us to do and sent the Gospel to them and made a Christian nation out of them instead of bringing them over here and selling them into slavery, Africa could have been a great nation of colored Christians. What we did was wrong. It was not right. It cannot be justified. We should not try to justify it. But people went along. Some good people fell for it and went ahead with it; and God overruled it.

I will venture there is not a population in the world where there is a larger percentage of professing Christians than among the colored people in the South. We Christian white people all have good friends among the colored people. The colored Christian people are sensing the dangers we are facing now. There is already an uprising among good, Christian colored people in the South. They are trying to fight back the subtle, Satanic disturbance we have in this country.

There has never been a time, especially in the last ten years, when the white people in the South were so eager to help the colored people build their schools and see that they get what they ought to have. All this agitation going on is not headed up by real, Bible-believing, Christian people.

These religious liberals are the worst infidels in many ways in the country; and some of them are filling pulpits down South. They do not believe the Bible any longer; so it does not do any good to quote it to them. They have gone over to modernism, and they are leading the white people astray at the same time; and they are leading colored Christians astray. But every good, substantial, Bible-believing, intelligent, orthodox Christian can read the Word of God and know that what is happening in the South now is not of God.

God gave every race something. He gave the Africans something. He gave the Chinese something that he did not give the Japanese. He gave races certain things. He chose

the Jews. They are the most wonderful people who ever lived in the world. God chose them; and God segregated them, not because they were inferior but because He had a purpose for that race.

God Almighty had a purpose for the Jewish race; and for that purpose to be carried out, He had to separate them from among the nations of the earth. God chose Israel; and through the loins of Israel, He brought us the Messiah. He gave us the Bible through Israel. The Jews have outlived all the nations. They have been scattered over the face of the earth, and they have kept their racial identity through the years. You will find the Jew in London, the Jew in New York, the Jew in San Francisco, the Jew in Tokyo, the Jew in Hong Kong. I congratulate them. I am a friend of the Jew. I believe that the Covenant that God made with Abraham holds good until this day, "I will bless them that bless thee, and curse him that curseth thee . . ."

The Jews are back in Palestine with a Government today. God scattered them, but He brought them back to their homeland. I am for them, and I am for their homeland and for their Government. I do not agree with them about Jesus. I know Jesus Christ was the Son of God; and I know that when Jesus Christ comes back again, He will be the King of Jews and will be accepted, and a nation will be born in a day, and Jerusalem will be the capital of the world. That is all in the Bible. It is clear as day.

Yes, God chose the Jews. If you are against segregation and against racial separation, then you are against God Almighty because He made racial separation in order to preserve the race through whom He could send the Messiah and through whom He could send the Bible. God is the author of segregation. God is the author of Jewish separation and Gentile separation and Japanese separation. God made of one blood all nations, but He also drew the boundary lines between races.

Of course, in America we do not have a serious problem with the Orient. If we had as many Chinese and Japanese

as we have colored people in the South, we would run into the same problem; but we have no Oriental problem here in the South.

Some of the most wonderful people in the world are Chinese and some are Japanese; and some of the most wonderful people who ever breathed the breath of life are colored people. Every one of you white folks who are listening to me now have colored friends. I have, and I would fight for them; and you would, too. It has always been that way. Individually, we are friends. Racially, we are not at enmity; but we are separate races. We have lived here in the South through these years.

After the Civil War the colored people wanted to build their schools and churches, and white friends made financial contribution to the building of these schools and churches. Back in those days it was not easy when the white folks were paying most of the taxes — don't you colored friends forget that when you are inclined to turn away from your white friends. You colored people might also remember that your ancestors in the South who were slaves breathed an atmosphere of culture back in those pre-Civil War days. Think of what your ancestors received in such an atmosphere. Think of the religion that they learned and how they found God in slavery days. Think of those old white preachers who preached to your colored ancestors when they were slaves.

Now listen, the time has come when we ought to sit down and go to thinking some things through in this country. And you colored people listening to me and you white people listening to me ought to keep your heads cool and your minds clear and your hearts warm and keep up these friendly relations we have had through the years. Do not let this outside, Communistic, Hellish influence disturb the friendly relation we have had in the South. The situation in the South had been better in recent years than it had ever been; and all of this agitation is going to set this country back in the South for twenty-five to fifty years. We are headed that way. We ought to rise up and begin to face this thing like we ought to face it as neighbors and friends. Every one of you colored

people know your white friends. And you white people know your colored friends. We have some of them, and we would not let anybody mistreat them if we could help it; and they would not let anybody mistreat us. It has always been that way in the South.

But racially, we have separation in the Bible. Let's get that clear. Any race has a right to come to America. We do not mean that when we came over here we wiped out the line between races. We did not do that. We should have let the Africans stay in Africa instead of bringing them here for slaves, but did you colored people ever stop to think where you might have been if that had not happened? Now, you colored people listen to me. If you had not been brought over here and if your grandparents in slavery days had not heard that great preaching, you might not even be a Christian. You might be over there in the jungles of Africa today, unsaved. But you are here in America where you have your own schools and your own churches and your own liberties and your own rights, with certain restrictions that God Almighty put about you — restrictions that are in line with the Word of God. The Jews have lived a separated race. They have been separated from the other races of the world. They have been miraculously preserved. Now they have a homeland. They are back there today, and what a wonderful thing is happening.

The time has come when we good folks down here in the South — the good colored people and the good white people — need to use our heads. We should not let this outside agitation disturb us down here. Now, listen just a minute. You colored people are entitled to good schools. You ought to have them. I would like for you to remember something. Just remember that the South went through reconstruction and had a hard time. It was not easy. Then remember something else, too. When your ancestors were slaves in the homes of these Southern people, they got a breath of culture that they could not have gotten even in the schoolrooms of America. They heard the old-time preachers. I have said many times that the greatest preachers who have lived since the Apostolic days were the preachers of the South — the preachers who

preached to the colored people. And back there the slaves had the Gospel. They heard it and were converted. They were saved.

Many of these slave owners were godly, spiritual people. I remember hearing about when John Jasper was converted at a corn husking and began to shout. His master said, "John, what is the matter?" He said, "I have just been converted — been saved." "Well," he said, "I am a Christian, too. We are brothers." They shook hands. He said, "Now, John, you take a day off and go around and tell all the colored folks how you found the Lord. Take a day off and tell them."

Back in the old days when I began to preach, over sixty years ago, nearly every church I went to had a few old colored people who never did leave. They said, "We want to stay here. We got converted here and want to stay here." They were encouraged, and the white people helped build their churches. They stood by them through the years.

Now, you intelligent-thinking colored people know that you are with your friends. Do not lose your friends. Your friends are not somewhere else. They are right down here in this country. Remember that now.

I have no axe to grind. I would like to tell you something. We had planned to build a school, just like Bob Jones University, here in the South for colored people. We wanted to build it. But we have run into this agitation now that makes it difficult, and the years are piling up. I do not suppose I will ever be able to build it. We wanted to build a great school where colored people could come and get all the culture that we offer here at Bob Jones University. We would not have faced the problems that are faced where there is integration. We wanted to build a place where Christian colored people could get their education in an atmosphere where their talents in music and speech and art and all could be preserved and handed down. We wanted to build that kind of a school. We had that in mind until all this agitation started. Now we have a mess on our hands, and it is spreading out over this country.

You white folks listen to me. Just remember the good, old, colored friends you had in the days gone by. I remember mine. I remember that old, colored woman who was with my wife's grandmother when she died. She used to be a nurse in the home way back in slavery days. I remember how my wife's grandmother said the happiest day she ever saw was when the slaves were freed. She owned hundreds of them, and she said, "I was so happy. I was afraid some of them would be lost; and I felt that God might hold me accountable." That spirit represented the Old South.

You say slavery was not right. Well, I say it was not right. I say the colored people should have been left over in Africa, and we should have sent missionaries over there and got them converted. That is what we should have done. But we could not have converted them as fast that way; and God makes the wrath of men to praise Him. They were brought over here, and look what they have. They have their churches. They have a freedom here they do not have anywhere else in the world. They have an understanding here. Let's not wipe out the line of understanding.

Now, I am appealing to you colored people and to you white people. Let's use our heads. Let's be intelligent. Let's not try to kick the Bible off the center table. Keep your Bible where it belongs. When they tell you that God Almighty is not the author of the boundaries of nations, you tell them that is wrong. You tell them it is perfectly clear in the Bible that God made of one blood all nations but that He also fixed the bounds of their habitation. There is nothing unscriptural about that.

Listen just a minute. We are trying to bring a few people from other lands here to Bob Jones University so we can educate them and help them. We have two Chinese gentlemen teaching here in this school. They are Christian men. They are intelligent men, and they understand what we are doing. They know where we are going. We honor them and respect them.

There is no problem here. But it could be a problem. It could be a problem in California. It could be a problem

anywhere. Whenever you get a situation that rubs out the line that God has drawn between races, whenever that happens, you are going to have trouble. That is what is happening today in this country. All this agitation is a Communistic agitation to overthrow the established order of God in this world. The Communistic influence is at work all about us. Certain people are disturbing this situation. They talk about the fact that we are going to have one world. We will never really have one world until this world heads up in God. We are not going to have one world by man's rubbing out the line that God has established. He is marking the lines, and you cannot rub them out and get away with it.

The established order cannot be overthrown without having trouble. That is what wrecked Paradise. God set up the order of Paradise. He told Adam and Eve how to live and what food to eat and what not to eat. He drew the lines around that Garden; and when Adam and Eve crossed over the lines of God, thorns grew on roses. The first baby that was born was a murderer and killed his own brother. So it has gone down through the ages. It is man's rebellion (due to the fall) against a Holy God to overthrow the established order of God in this world.

Now I can sit down with any Christian Japanese, any Christian Chinese, any Christian African, etc., anywhere in the world and as a Christian have fellowship. That is a different relationship. A Christian relationship does not mean a marriage relationship. You can be a Christian and have fellowship with people that you would not marry and that God does not want you to marry and that if you should marry you would be marrying outside the will of God. Why can't you see that? Why can't good, solid, substantial people who do not have any prejudices and do not have any hatred and do not have any bitterness see this? Let's approach this thing in a Christian way. Let's make the battle a Christian battle. Do not let people run over you by coming along and talking about the Universal Fatherhood of God and the Universal Brotherhood of man. There is no Universal Fatherhood of

God and Universal Brotherhood of man. There is not a word about that in the Bible.

We have three classes in the Bible. We have the Jew (a segregated race), the Gentile (and this includes everybody else), and the Church of God (meaning the Body of Christ, as it is used here). In the Church of God there are no Jews, no Gentiles, no white folks, no black folks. We are one in Christ. There is no trouble between a colored Christian and a white Christian. They operate as individuals and deal with each other as Christians who have their citizenship in Heaven. Up in Heaven there will be no boundaries. We will be one forever with Christ. But we are not one down here, as far as race is concerned and as far as nations are concerned. God said so, and Paul made it clear when he preached at Athens in the midst of Athenian culture. He said that God "... hath made of one blood all nations of men" But God has also done something else. He has fixed the bounds of their habitations.

A lot of this agitation comes from evangelists of a certain type who have never gone into this situation but who are going up and down rubbing out the line between those who believe the Bible is the Word of God and those who believe the Bible just contains or may contain the Word of God. They do not get all of this "hot-air" stuff out of the Bible. It is not in the Bible. It is nothing in the world but "hot-air" glamour with a sentimental, soap-bubble, anemic kind of a religion that is not in the Word of God.

I have been in this business all these years. I know something about it. I know what the Word of God teaches. I know what the great evangelists believed. I know how they stood through the years. We are facing serious dangers today — more serious than we can ever imagine. May God help us to see it and understand it and to be true to Him.

When you run into conflict with God's established order racially, you have trouble. You do not produce harmony. You produce destruction and trouble, and this nation is in the greatest danger it has ever been in in its history. We are facing dangers from abroad and dangers at home, and the reason

is that we have got away from the Bible of our forefathers. The best Christians who ever put foot on this earth since the Apostolic days were the men and women in America back in the old days. Some of them owned slaves, and some of them did not; and some of them were slaves, and some of them were not. Back in those days they believed the Bible, and God called this nation into existence to be a witness to the world and to be true to the Word of God. Do not let these religious liberals blowing their bubbles of nothing over your head get you upset and disturbed. Let's get back to the Word of God and be sensible.

You white folks and you black folks listening to me this morning, if you are Christians, we are one in Christ. If you are yellow or red or whoever you are, if you are Christians, we are one in Christ. We can get along together as Christians, and we had better stand together as Christians.

You preachers, listen to me. I know what is going on. We are facing dangers in America. Enemies are being made now that are dividing this country as it has never been divided in its history. We are facing the greatest dangers we have ever faced, and the religious liberals are riding in now on the crest of a wave of what seems to be popular.

If you are a Christian, you are not going to mistreat anybody. You will not mistreat a colored man or a white man or anybody else. Individually, we are one in Christ; but God has also fixed the boundaries of nations, and these lines cannot be rubbed out without having trouble. The darkest day the world has ever known will be when we have one world like they are talking about now. The line will be rubbed out, and the Antichrist will take over and sit down on the throne and rule the world for a little while; and there will be judgment and the cataclysmic curses found in the book of Revelation. We are going to face all this. May God help us to see it and to be true and faithful to Him.

"Our heavenly Father, bless our country. We thank Thee for our ancestors. We thank Thee for the good, Christian people — white and black. We thank Thee for the ties that

have bound these Christian white people and Christian colored people together through the years, and we thank Thee that white people who had a little more money helped them build their churches and stood by them and when they got sick, they helped them. No nation has ever prospered or been blessed like the colored people in the South. Help these colored Christians not to get swept away by all the propaganda that is being put out now. Help us to see this thing and to understand God's established order and to be one in Christ and to understand that God has fixed the boundaries of the nations so we would not have trouble and misunderstanding. Keep us by Thy power and use us for Thy glory, for Jesus' sake. Amen."

Letterhead of Department of the Treasury
District Director Internal Revenue Service
Columbia, S. C.

Bob Jones University, Inc.
Greenville, S. C. 29614

Gentlemen:

The Internal Revenue Service, after careful study, has concluded that private schools with racially discriminatory admissions policies are not legally entitled to Federal tax exemption and that contributions to such schools are not deductible as charitable contributions. This position is applicable to all private schools in the United States at all levels of education. The enclosed statements discuss this position in greater detail.

The Service will continue to recognize the tax exempt status of a private school where it has adopted and administers, or will adopt and administer, a nondiscriminatory admissions policy in good faith, and publicizes the fact within its community. The benefits of tax exempt status and deductibility of contributions will, however, be challenged by the Service where a private school practices racial discrimination in its admissions policy.

We are now reviewing all rulings and determinations issued to private schools in the United States in the light of this position. With but few exceptions, our present files on educational organizations do not contain information on admissions policies and related facts. Thus, this inquiry is being directed to all schools having Service rulings of tax exemption.

To enable us to determine your correct status, we ask that you answer the questions on page two of this letter. You may retain for your files the enclosed copy of this letter. If you wish, you may submit any documents you feel will have a bearing on the matter. Your reply should be made over the signature of a principal officer of your organization and should be returned to this office in the enclosed envelope within thirty days. If you are in process of clarifying or modifying your admissions policy, you may request an extension of time in which to supply additional information.

Your reply will be evaluated promptly, and you will be advised of our findings. If it appears that your exemption is brought into question, you will have an opportunity to present additional evidence and be heard before a decision is reached.

Thank you for your cooperation.

(Signature omitted)

Information to be Submitted to Internal Revenue Service

1. What are the present policies and practices of your school on admissions? ☐ Racially Nondiscriminatory ☐ Racially Discriminatory ☐ Other (Please explain.)

2. If you have a racially nondiscriminatory admissions policy, explain the manner in which it has been widely publicized. (Please furnish pertinent information from your catalog, local newspaper or other similar publications, and other supporting information demonstrating wide dissemination.)

3. If you are undertaking to modify or clarify your ad-

missions policy, explain your new or modified policy and your proposed methods of publicizing it. If you have already taken action, please furnish copies of any documents by which your policy is being established and publicized.

I declare that I have examined this questionnaire, including the accompanying statements, and to the best of my knowledge and belief it is true, correct and complete.

Date	Signature of Officer	Title
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Enclosures:

News Release dated 7/10/70

News Release dated 7/19/70

Self-addressed envelope

News Release

Internal Revenue Service, Washington, DC 20224

IRS Announces Position on Private Schools

Washington, D.C. — The Internal Revenue Service announced today that it has been concluded it can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes.

The Internal Revenue Service will proceed without delay to make favorable rulings of exemption immediately available to private schools announcing racially nondiscriminatory admissions policies and to deny the benefit of tax-exempt status and deductibility of contributions to racially discriminatory private schools.

The Service said that favorable rulings given to private schools in the past will remain outstanding where the school is able to show that it has racially nondiscriminatory admissions policies.

All private schools with favorable rulings outstanding will receive a written inquiry from the District Director of Internal Revenue and it is anticipated that in most instances evidence

of a nondiscriminatory policy can be supplied by reference to published statements of policy or to the racial constituency of the student body.

Where a school fails to establish that it has a racially nondiscriminatory admissions policy, an outstanding ruling of exemption will be withdrawn. However, a school seeking to clarify or change its policies and practices will be given a reasonable opportunity to do so in order to retain its ruling of federal tax exemption. In any event, full opportunity to present evidence and be heard will be provided in accordance with usual revenue procedures and the right to appeal to the courts will be available. Similar principles will be followed in acting upon requests made by new schools for rulings.

4:00 PM, EDT

7/10/70

News Release

Internal Revenue Service, Washington, DC 20224

IR-1052

Washington, D.C. — The Internal Revenue Service today announced it has issued favorable rulings of exemption to six private schools that have announced racially nondiscriminatory admissions policies. The schools are located in five different southern states.

The rulings were the first to be issued under the statement of position announced by the IRS on July 10 concerning the tax status of private schools. Other applications for exempt rulings, pending at the time of the announcement, which meet the stated standards will be processed expeditiously, the IRS said.

The IRS said the written inquiry on admissions policies to be sent to all private schools that currently hold favorable tax exemption rulings is now being developed. Inquiry letters are expected to be sent out by the 58 IRS district directors within a few weeks.

The six schools to which new favorable rulings of exemp-

tion were issued had provided the IRS complete information that they had a racially nondiscriminatory admissions policy announced within their respective communities. The schools are:

Nathanael Green Academy, Inc.
Siloam, Georgia

The Heritage School, Inc.
Newnan, Georgia

The Gaffney Day School
Gaffney, South Carolina

Desoto School, Inc.
Helena, Arkansas

Southeast Education, Inc.
Dothan, Alabama

Pamlico Community School
Washington, North Carolina

In response to questions it has received, the IRS also issued a more detailed explanation of its July 10 statement of position on the tax status of private schools. In that statement the IRS said, in the future, favorable rulings of tax exemption would be available where schools announced racially nondiscriminatory admissions policies.

The IRS said its July 10 statement does not affect a school's ordinary admissions policies which have no relation to race. The IRS specifically added that a school's ordinary academic standards will not be affected.

The IRS explained that its July 10 statement is applicable to all private schools throughout the United States, except as limited by the order of a three judge Federal District Court in the District of Columbia, in *Green v. Kennedy and Thrower*. That court has ordered that rulings be issued in Mississippi only under terms and conditions approved by the court.

In its initial nationwide review of the present status of private schools, the IRS said that where a school has adopted

and publicly announced a racially nondiscriminatory admissions policy, it will assume, in accord with normal procedures in requests for rulings, that such policy has been adopted and will be maintained in good faith. If subsequent examination by an IRS field office indicates that a school has not administered such a policy in good faith, the tax exempt status of the school will be challenged.

The IRS also said that, should an existing ruling of a private school be revoked as the result of such a challenge, persons contributing to the school will be allowed to deduct contributions made prior to the date of the public announcement by the IRS of the revocation. This follows the usual IRS rules and procedures on contributions.

The IRS added that its statement of position on racially nondiscriminatory admissions policies would be applicable to all private schools, whether church related or not. Selectivity of students, as by a religious seminary, having no relation to racial discrimination would not be inconsistent with the IRS statement of position.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF MOTION
FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

State of South Carolina
County of Greenville

Personally appeared before me John E. Fowler, who first being duly sworn states and deposes that he is a Certified Public Accountant with the firm of Turnbull, Orr and Fowler, Chattanooga, Tennessee, and is a member of the American Institute of Certified Public Accountants.

For a period in excess of twenty-five (25) years, the firm of Turnbull, Orr and Fowler has been employed by Bob Jones

University, Greenville, South Carolina, Plaintiff in the above-entitled action, and has as a consequence of said employment examined the books, records, and financial statements of Bob Jones University. I am personally familiar with the books, records and financial statements of Bob Jones University.

The books and records of Bob Jones University as maintained presently and over a period of years have not been maintained for the purpose of complying with any requirements which would be necessary should the University be required to file Federal income tax returns. The University does not have a plant ledger showing costs reserved for depreciation and remaining life of its useful assets. In my opinion, in order to figure income or loss for Federal income tax purposes, it will be necessary to assign a value to the assets of the University and to apply acceptable depreciation schedules to such assets. In order to establish the value of the University's assets, all available records for a large number of years would have to be examined and re-examined. A major portion of the physical plant of Bob Jones University was built and equipped in the years of 1946 and 1947 and records as to these assets would have to be examined from those years to the present.

From my knowledge of the books and records of Bob Jones University, I am of the opinion that in many instances, sufficient detailed records are not available.

In my opinion, the only alternate method of establishing the value of the University's assets for Federal income tax purposes would be to employ an appraisal company to make an appraisal of the University's assets. In my opinion, such an appraisal would be very expensive and time consuming.

From the books and records of the University which are presently available, I estimate the Federal income tax liability of the University for the fiscal year ending May 31, 1971, would be approximately \$750,000 if the University had been required to pay Federal income tax. I am informed and believe that for the current fiscal year ending May 31, 1972, the Federal income tax liability of the University would be

in excess of \$500,000 should the University be required to pay Federal income tax.

Bob Jones University does not employ accountants versed in Federal income tax law or regulations and in my opinion that should the University be required to file Federal income tax returns, it would be necessary for the University to employ at least two additional persons well-versed in Federal income tax law and regulations. In my opinion the cost to the University in employing said additional persons would be approximately \$25,000 per year.

I have considered and studied various accounting and tax questions which would arise should the University be required to file Federal income tax returns. In my opinion, the Internal Revenue Code, regulations issued pursuant thereto and case law do not provide adequate guidelines as to the proper procedures to be used. Therefore, I would anticipate and expect considerable controversy to arise regarding appropriate accounting procedures to be used.

Based upon my knowledge of the present books and records of Bob Jones University and the requirements of filing Federal income tax returns, and should the firm of Turnbull, Orr and Fowler be selected to prepare Federal income tax returns for the University, that the fee for filing the first year return would be between \$80,000 and \$100,000. In my opinion it would require at least one year before such a Federal income tax return could be prepared.

In my opinion the financial burden which would be imposed on the University, should the University be required to file Federal income tax returns and pay the required tax would be such that it would seriously jeopardize its continued operation.

(Signature and Jurat omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF MOTION
FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

State of South Carolina
County of Greenville

Personally appeared before me Bob Jones, Jr., who first being duly sworn, states and deposes:

I am Chairman of the Board of Trustees of Bob Jones University, Greenville, South Carolina, Plaintiff in the above-entitled action. I am familiar with the beliefs and principles on which Bob Jones University has been founded and continuously operated by its Board of Trustees.

I believe that God made of one blood, all nations of men for to dwell on all the face of the earth and has determined the bounds of their habitation (Paul's Sermon on Mars Hill). I believe that God intended that the various races of men should live separate from each other. I believe that the inter-marriage of the members of different races is contrary to the will of God and that any action or policy that I or Bob Jones University might follow or adopt which would tend to lead to or promote the inter-marriage of the races would be contrary to the Word of God and sinful. I further believe that to admit Negro students to Bob Jones University at the present time would tend to lead to and would promote the inter-marriage of the races contrary to the Word of God and the religious beliefs and principles of Bob Jones University.

My religious beliefs and principles and those of the University prohibit me from advocating any type of change in the admissions policy of the University.

(Signature and Jurat omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT

State of South Carolina
County of Greenville

Personally appeared before me Wesley M. Walker, who first being duly sworn, states and deposes:

I am a member of the law firm of Leatherwood, Walker, Todd & Mann of Greenville, South Carolina and our firm is counsel for Bob Jones University, Plaintiff in the above captioned matter. On April 21, 1971, together with J. D. Todd, Jr. and O. Jack Taylor, Jr., who are members of our law firm, I met with representatives of the Internal Revenue Service in Washington, D. C., concerning the tax exempt status of Bob Jones University. The representatives of the Internal Revenue Service who were present at this meeting included Randolph W. Thrower, who was then the Commissioner, K. Martin Worthy, Chief Counsel of the Internal Revenue Service, and William H. Connett, an Assistant to the Commissioner. According to my recollection there were present two additional representatives of the Internal Revenue Service, but I did not write down their names. At this meeting it was clearly indicated that the admissions policy of Bob Jones University was such that its tax exempt status was in serious jeopardy and this was the primary subject matter of the meeting. A short time after the aforesaid meeting, I requested the opportunity to be able to confer with officials of Bob Jones University to investigate any possibility that there might be a change in the University's admissions policy. At that time University officials were out of the United States and it was some time before I was able to arrange a conference with our client. During this period of time and prior to his leaving, I advised Commissioner Thrower that after discussing the matter with officials at the University, I would telephone

Mr. William H. Connett, the above mentioned Assistant to the Commissioner, to advise him of the results of my conference. On or about July 29, 1971, I conferred with officials of Bob Jones University and as a result, I was informed that there would be no change in the admissions policy of Bob Jones University. Thereafter, I telephoned Mr. William H. Connett and advised him of the results of my conference with officials of the University and further requested a conference with the Defendant, Johnnie M. Walters, Commissioner of Internal Revenue, so that counsel for Bob Jones University would be able to make clear the University's position to the new Commissioner. I am informed that on August 11, 1971, Mr. William H. Connett attempted to telephone me and that at such time I was not available. On August 12, 1971, I telephoned Mr. Connett in Washington returning his telephone call of the previous day. I was informed by Internal Revenue personnel in Washington, D.C., that Mr. Connett was in Atlanta, Georgia, at the Office of the Internal Revenue Service there. I telephoned Mr. Connett at the Internal Revenue Service in Atlanta, Georgia, and was able to reach him in the Office of the District Director of Internal Revenue in Atlanta, Georgia. During my telephone conversation with Mr. Connett, he advised me that decision had been made to revoke the tax exempt status of Bob Jones University and that the University would receive immediately in the due course of the mails a letter from the District Director of Internal Revenue in Atlanta, Georgia, revoking the University's tax exempt status. I am informed that further attempts were made to contact the Defendant, Johnnie M. Walters, Commissioner of Internal Revenue, for the purpose of obtaining a conference at which time counsel for the University would be allowed to make clear the University's position. I am further informed that as a result of these attempts a conference was held in Washington, D.C., on September 8, 1971, at which time the Commissioner of Internal Revenue informed counsel for Bob Jones University that the process of the Internal Revenue Service would immediately be resumed to revoke the tax

exempt status of the University and that the University would be immediately notified by the District Director concerning the matter.

(Signature and Jurat omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT

State of South Carolina
County of Greenville

Personally appeared before me Fletcher C. Mann, who, after being duly sworn, deposes and states as follows:

The deponent is a member of the law firm of Leatherwood, Walker, Todd & Mann of Greenville, South Carolina, and, as such, is one of the attorneys for Bob Jones University of that city. On Friday, August 13, 1971, in a conference with certain members of his law firm, the deponent learned that the tax exempt status of Bob Jones University was in jeopardy and, by reason of the admissions policy of said University, the revocation of the tax exempt status of said University had been, or was then being, considered by the Internal Revenue Service and the administrative process within the Internal Revenue Service had been, or was then being, expedited to effectuate said purpose. As one of the attorneys for Bob Jones University, the deponent immediately attempted to contact the Honorable Johnnie M. Walters, Commissioner of Internal Revenue, by telephone but could not reach him until Monday, August 16, 1971.

In a telephone conference with Commissioner Walters on Monday, August 16, 1971, the deponent requested a delay by the Internal Revenue Service until such time as the deponent could discuss with appropriate officials of Bob Jones University the admissions policy of that institution and the

requirements and standards established by the Internal Revenue Service with respect to the granting of a tax exempt certificate. The deponent thereafter advised Commissioner Walters of the absence from Greenville of Dr. Bob Jones, Jr. and of the inability of the deponent to immediately discuss said matters with the officials of the University. The deponent was requested by Commissioner Walters, by reason of the urgency of the matter, to immediately advise him of the position of the University concerning said matters as soon as the deponent could discuss the same with its officials.

Having been advised on August 31, 1971, of the return to Greenville of Dr. Bob Jones, Jr., the deponent on September 1, 1971, conferred with officials, including Dr. Bob Jones, Jr. of the University, concerning its admissions policy and the imminence of the revocation of its tax exempt status. Following discussions of the matter with officials of the University, the deponent arranged a meeting with Commissioner Walters at his office in the Internal Revenue Building, Washington, D.C., for Wednesday, September 8, 1971. At that time, the deponent met and discussed with Commissioner Walters the admissions policy of Bob Jones University and the standards required for the maintenance of its tax exempt status. The deponent was advised during the discussion that the policy of Bob Jones University relating to admissions did not, in the opinion of the Commissioner, meet the standards or guidelines established by the Internal Revenue Service for tax exempt status; that in view of the urgency of the matter, the administrative processes of the Internal Revenue Service for notice to the University of the revocation of its tax exempt status would be resumed and the University would promptly hear from the District Director of Internal Revenue in Atlanta, Georgia concerning said matter.

(Signature and Jurat omitted)

IN THE UNITED STATES DISTRICT COURT FOR
THE
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

MOTION TO DISMISS

The defendant, John B. Connally, Jr., Secretary of the Treasury and Johnnie M. Walters, Commissioner of Internal Revenue, move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing the plaintiff's complaint on the grounds that:

1. This Court lacks authority to grant the relief requested because the provisions of 28 U.S.C., Section 2201 forbid the granting of a declaratory judgment with respect to Federal taxes.

2. This Court lacks jurisdiction to grant the relief sought in that Section 7421(a) of the Internal Revenue Code of 1954 specifically prohibits the court from enjoining the assessment and collection of Federal taxes.

3. This Court lacks jurisdiction to grant the equitable relief sought because the plaintiff has an adequate remedy at law in that it may litigate any proposed deficiency in income taxes before payment in the United States Tax Court or bring an action for refund in the Federal Court after payment of income or other Federal taxes assessed.

4. This Court lacks jurisdiction to grant the equitable relief sought in that the plaintiff has not exhausted the administrative remedies available to it before plaintiff's ruling of exemption may be revoked as prescribed for by Revenue Procedure 68-17, 1968-1 Cum. Bul. p. 806 and Revenue Procedure 69-3, 1969-1, Cum. Bul. p. 389.

5. This Court does not have jurisdiction over the persons of the defendants inasmuch as this suit is, in fact, one against the United States, and, as such, is barred by sovereign immunity.

6. The complaint fails to state a claim upon which relief can be granted.

(Signature and Certificate of Service omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS

Personally appeared before me William H. Connett, who first being duly sworn, states and deposes:

I am Assistant to the Commissioner of Internal Revenue and in such capacity act as principal spokesman for the Commissioner on matters relating to the administration of the exempt organizations provisions of the Internal Revenue Code.

On July 10, 1970, the Internal Revenue Service announced that it had been concluded that the Service could no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor could the Service treat gifts to such school as charitable contributions. The announcement went on to state that the Service would proceed to deny the benefit of tax-exempt status and deductibility of contributions to racially discriminatory private schools. A copy of the announcement is attached as Exhibit A.

The announcement also stated that all private schools with outstanding favorable rulings would receive a written inquiry from the District Director of Internal Revenue and that, where a school failed to establish that it already had or would adopt a racially nondiscriminatory admissions policy, the outstanding ruling of exemption would be withdrawn.

On November 30, 1970, the Service mailed a letter of inquiry to each school which our records showed had an individual ruling recognizing it tax-exempt. The letter notified the addressee of the Service requirements of a racially non-discriminatory admissions policy as a condition of continued recognition for tax exemption and asked each school to furnish specific information regarding its admission policy within thirty days. Such a letter of inquiry, copy attached as Exhibit B, was mailed to Bob Jones University, Inc. By letter dated December 30, 1970, copy attached as Exhibit C, the University replied that it did not admit black students.

At the time this response was received, the district offices had not been given instructions for the processing of replies to the letter of inquiry. All replies were being held in suspense until the instructions were issued.

Before these instructions were issued to the district offices, I became aware that the University might adopt a racially nondiscriminatory admissions policy. Accordingly, I requested the District Director of Internal Revenue, Atlanta, Georgia, the official with responsibility for exempt organizations matters in the State of South Carolina, to defer action on the University's response pending advice from me.

In late July 1971, I received a telephone call from Mr. Wesley Walker, attorney for the University, who advised me that the Board of Trustees of the University was not inclined to adopt a racially nondiscriminatory admissions policy. Mr. Walker asked for the opportunity, nevertheless, to confer with the Commissioner of Internal Revenue about the matter. Following discussions with the Commissioner, I spoke by telephone with Mr. Walker on August 12, 1971, and advised him that we did not believe that any useful purpose would be served by a conference with the Commissioner at that time. I further advised Mr. Walker that the office of the District Director of Internal Revenue, Atlanta, Georgia, would proceed to process the University's response to the letter of inquiry and in due course would contact the University. Following the telephone conversation, I orally advised represen-

tatives of the District Director that they could process the University's response.

In the next few days, the Commissioner advised me that he had been contacted by Mr. Fletcher C. Mann, a member of the same law firm as Mr. Walker, and that I should again instruct the Atlanta district to withhold any action in processing the University's response. I so advised the appropriate District personnel.

On September 8, 1971, the Commissioner advised me that he had met with Mr. Mann and it appeared unlikely that the University would adopt a racially nondiscriminatory policy. Unless we received further advice from the University or its representatives within the next few days, I intended to tell the District Director that he need no longer defer processing the University's response. However, on September 10, 1971, I was notified that the University had applied for an injunction in this matter and, as a result, the District Director has been advised to continue to withhold action on the University's response.

If the District Director is instructed to process the University's response, the following procedures which have and are being used in all other such cases would be followed.

A representative of the District Director would contact the University or its representatives by telephone and attempt to elicit conformance with Service requirements. The University would also be offered the opportunity of a conference at some mutually convenient date with Service representatives in either Columbia or Atlanta. Any reasonable delay in arranging the conference would be permitted.

At the conference, the Service representatives would explain the requirements concerning a nondiscriminatory admissions policy and again attempt to elicit conformance. If the organization requested a reasonable extension of time such as thirty days in which to consider possible conformance, the extension would be granted.

If the organization made clear that it would not conform to the requirements of a racially nondiscriminatory admissions

policy and waived the right to a conference, the District Director would send the organization a letter stating that because of the school's refusal to meet the requirements for exemption from Federal income tax, he was proposing to recommend to the Assistant Commissioner (Technical) that the advance assurance of deductibility of contributions to the school be suspended and also proposing to revoke the ruling recognizing the organization as tax exempt.

*Proposal to Suspend Advance Assurance
of Deductibility of Contributions*

As to the proposal to suspend advance assurance of deductibility of contributions, the notice would advise the organization that it might, within ten days, submit a written protest to the action and be afforded a conference in the District office. If, after protest and conference, the District Director still believed that there was serious doubt concerning the organization's continued qualification to receive deductible contributions, he would notify the organization that he was recommending to the National Office of the Internal Revenue Service that advance assurance be suspended pending final determination of the status of the organization.

If the National Office was prepared to concur in the District Director's recommendation, it would contact the organization and offer it a conference in the National Office. A reasonable period for submitting any information relevant to the issue would be afforded the organization.

In the event the National Office concurred in the recommendation, the District Director would notify the organization of the decision and would also inform it that a suspension of advance assurance of deductibility of contributions would be published in a Technical Information Release, followed by an appropriate announcement in the Internal Revenue Bulletin.

If, at any time after the suspension of advance assurance, the District Director found that the organization was qualified to receive charitable contributions deductible by the donors,

he would request the National Office to rescind the suspension action.

Proposal to Revoke Recognition as Exempt

As to the proposal to revoke recognition of the organization as tax-exempt, the notice would advise the organization of its right to protest the proposed action by submitting a statement of the facts, law, and arguments in support of its continued exemption, and of its right to a district office conference. The organization would generally be afforded thirty days in which to respond to this letter and also be afforded a reasonable period of time in which to arrange a mutually acceptable conference date, if a conference were requested.

In the event the organization agreed with the proposed action or if no protest was filed, the District Director would issue a determination letter revoking the ruling recognizing the organization as tax-exempt.

If, after considering the organization's protest and any information developed in conference, the District Director maintained his position and the organization did not agree, the file and protest would be referred to the National Office. The organization would be notified of this referral and be afforded the opportunity for a conference in the National Office. Alternately, the organization could waive its rights to a district office conference and request referral of the matter directly to the National Office. After the file was received in the National Office and reached for consideration, a mutually agreeable date for the conference would be arranged. Several months may elapse from receipt of the file in the National Office to the scheduling of a conference. Following the conference, the organization would be provided a reasonable period of at least thirty days in which to submit additional information, facts or arguments in support of its claim to continued recognition as exempt.

After the organization had been afforded its appeal rights in the National Office, if requested, and all information in the files had been reviewed, the National Office would pre-

pare a memorandum advising the District Director of its conclusions. If the District Director were advised that the National Office concurred in the proposed revocation, the District Director would prepare and issue a revocation letter to the organization.

In the event a revocation letter is issued, the appropriate Internal Revenue Service personnel would determine what taxes are due and issue notice of proposed assessment following revenue procedures applicable to assessment and collection.

(Signature and Jurat omitted)

The announcement of the Internal Revenue Service dated July 10, 1970, attached as Exhibit A to the Affidavit of William H. Connett, has been reproduced previously in this Appendix at Page A-38.

The letter from the District Director, Internal Revenue Service, Columbia, South Carolina, to Bob Jones University, dated November 30, 1970, attached as Exhibit B to the Affidavit of William H. Connett has been reproduced previously in this Appendix at Page A-36.

Letterhead of Bob Jones University
Greenville, S. C.

December 30, 1970

District Director
Internal Revenue Service
901 Sumter Street
Columbia, South Carolina 29201

Dear Sir:

Re: Your letter of November 30, 1970 (400-EO)

Bob Jones University has received your letter of November 30, 1970, stating that it is now the policy of the Internal Revenue Service to revoke the tax exempt status of private schools which otherwise qualify if such schools do not adopt a racially non-discriminatory admissions policy. You ask that we reply to certain questions set forth in your letter. We do

not believe an adequate reply can be made on the form you supplied, thus we are writing this letter in reply.

Bob Jones University is governed by a Board of Trustees, who do not believe it is for the best interest of the school or for the best interest of its students to have an open admissions policy at the present time. This is no recent policy change, and this school was not founded to provide some way to avoid the effects of government enforced intergration of the schools. Bob Jones University has been in existence for over 40 years and matriculates approximately 4,500 students. Those students are from every state in the Union and from 20 to 30 foreign countries each year. The University has no Blacks in its student body, and it is the unanimous conviction of this Board that the University shall not enroll Blacks. These convictions on the part of the Board of Trustees, which are of long standing, in no way change the status of Bob Jones University as a non-profit religious and educational institution. It always has been and is now a non-profit institution devoted to furnishing Christian education to its students in line with the stated purpose in its Charter:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures; combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching

the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

The convictions of the Board and Administration of Bob Jones University are now and have always been that this institution should not seek or accept financial grants from the Federal Government, and we have consistently refused to sign the Statement of Compliance with the Civil Rights Act since to do so would be to sign away the authority of this Board to operate a religious institution in line with its declared purposes and give to the United States Government the control of the policies of the institution.

Bob Jones University is operated exclusively for religious and educational purposes as set forth in the Internal Revenue Code. It has enjoyed a tax exempt status as a religious and educational institution for over 40 years purely and simply because it was an educational and religious institution. It has graduated thousands of well-trained Christian men and women who have become outstanding citizens in their communities and leaders in various walks of life. It might be pointed out in passing that this institution seeks always to be loyal to the Constitution of the United States and to foster love of country and patriotism. We have had on this campus no anti-war demonstrations, no riots, no flag burnings, and no revolutionary propaganda; and we would not tolerate any of these at Bob Jones University.

Bob Jones University does not indulge in promoting racial ill will; but, on the contrary, believes in and advocates in every way possible a feeling of reconciliation between the races. No individual, because of race, is denied admission to any religious service or secular program on this campus and open to the general public. The admission policies of the museum and art gallery (a tremendous cultural contribution of the University to the entire area) are applied without regard to race; and no racial consideration is involved in the gallery tours conducted for the children of the public schools, and these are offered in the interest of and in cooperation with scores of public schools annually. But because of religious belief and other reasons as well, the University does not feel it is wise to have black students in its student body.

It is not felt that this policy is discriminatory in the legal sense since it in no way involves governmental action. It is the feeling of the Board of Trustees that a black Christian school similar to Bob Jones University would have every legal and moral right to refuse to accept white students and that this would not constitute discrimination against Whites.

It is the firm conviction of the Board of Trustees of Bob Jones University that any private institution has a right under the United States Constitution to determine its own admissions policies and that the Federal Government should not discriminate against such an institution because of its admissions policies. It is our belief that a tax exempt status was granted to religious and educational institutions because they were religious and educational without regard to their admissions policies. We certainly trust that upon mature consideration of the educational, eleemosynary, religious, and Constitutional questions involved, the Internal Revenue Service will not discriminate against Bob Jones University by attempting to withdraw its tax exempt status. If the Internal Revenue Service removes Bob Jones University's tax exempt status because of its admissions policies, then, by the same token, it should deny tax exempt status to any church that refuses to admit any person to membership for any reason whatsoever.

(Signature and Certificate of Service omitted)

A-60

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS

District of Columbia, ss.:

Supplementing the Affidavit heretofore executed by the undersigned there are attached hereto certain documents from the Internal Revenue Service files concerning Bob Jones University.

These documents are:

Exhibit D: Copy of a letter dated December 9, 1970, signed Bob Jones, President, with a one-page enclosure entitled "A Statement From the President of Bob Jones University."

Exhibit E: A Statement from the Chairman of the Board of Trustees and the President of Bob Jones University dated September 10, 1971.

(Signature and Jurat omitted)

Letterhead of Bob Jones University
December 9, 1970

My dear Friend:

IT LOOKS AS IF BOB JONES UNIVERSITY WILL
LOSE ITS TAX EXEMPT STATUS SHORTLY.

We have received from the Internal Revenue Service a notice that any institution that does not enroll black students without restriction will no longer be granted exemption from income tax and that gifts made to such institutions will no longer be tax deductible. I hope you will read very carefully the enclosed material explaining just why Bob Jones Univer-

sity does not accept black students. We are not "against" Blacks. Our Board simply does not feel it is in the best interest of either our white students or the Blacks themselves to enroll black students at the present time with conditions as they are.

If we are denied the same tax exemption privileges that other institutions have, the Executive Committee has unanimously determined to enter suit. It may cost us as much as \$250,000 to sue the government, and it is a disgraceful situation that this present United States Administration, by its unfairness, puts a Christian institution in a position of having to spend the Lord's money this way. It has come to us from a rather direct source that President Nixon is solely responsible for pushing this through and that certain of the men in the Internal Revenue Service believe that this action is unfair and unAmerican and that some of their lawyers seriously doubt that it will be sustained in a court of law; but the President, according to the information that has come to us, has forced the issue.

It is most significant that there is no question of cutting off the tax exemption of institutions that are training militant Blacks, revolutionaries, Communists, and arsonists. No attempt has been made to take away tax exemptions from institutions which have Communists and revolutionists on their faculty — men and women who are seeking to overthrow America and train young people for that purpose — but the government is trying to discriminate against a Christian institution that is peaceful, patriotic, and seeking to train spiritual young men and women who will go out and make a real contribution to America and who will not drop out of society and seek to overthrow "the Establishment."

If the income tax exemption can be used to blackmail educational institutions, the next step is to use it to blackmail churches. The National Council of Churches and liberal denominations would like nothing better than to see this pressure applied to independent, fundamental, Bible-believing churches to force them "into line." We feel, therefore, that

the whole cause of Christ is at stake in this matter; and Bob Jones University is going to fight for fairness and freedom for all Christian educational institutions and churches in America.

Many of our friends have assured us that if this goes through, instead of cutting off their donations, they will double them; and I believe this represents the spirit of most of the people who support Bob Jones University. I am confident that out of this discrimination against this institution because of its religious convictions God is going to bring glory to Himself and rebuke to the tyrants in Washington.

We have until December 30 to file our statement, which must then be processed. We are going to wait until that date to file our statement if our attorney advises us to file at all. In any case, we are going to "stall"-it as long as we can; and after it is filed, it will take them a few days at least to process it. **THIS MEANS THAT ANY GIFTS MADE TO BOB JONES UNIVERSITY IN THE NEXT FEW WEEKS WILL BE TAX DEDUCTIBLE.** I hope, therefore, our friends will give as generously as possible in these last two or three weeks of 1970 and that whatever they plan to do for us in 1971, they will do **IMMEDIATELY AFTER THE FIRST OF THE YEAR SO THOSE GIFTS WILL APPLY TOWARD THEIR CHARITABLE DEDUCTIONS IN 1971.** It may mean somebody is going to have to sacrifice, but Bob Jones University is sacrificing for this cause, too; and I know our friends are going to rally.

I know we can count on your prayers. Pardon this lengthy letter, but we wanted you to know the facts. Pray for us. God bless you.

(Signature omitted)

A STATEMENT FROM THE PRESIDENT OF BOB JONES UNIVERSITY

The Board of Trustees of Bob Jones University is made up of fifty godly men and women from all sections of the United States. They are unanimous in their convictions that Bob Jones University should not enroll Negro students. This Board is responsible for administering the affairs of Bob Jones University, establishing its policies; and seeing that it is operated in line with Scriptural principles.

The fact that we do not accept Blacks as students here does not mean that we are against the Negro race, that we do not love the Negro, or that we are not concerned about his spiritual welfare. I wish there were an institution like Bob Jones University established exclusively for Negroes; however, with the present emphasis in this country, Negroes would not accept a school established solely for Blacks because the whole emphasis today is on a breaking down of racial barriers which God has set up; and where God sets up barriers, He does it for human good. In fact, Paul makes this quite clear in his sermon on Mars' Hill, the first portion of which the integrationists love so to quote: "He has made of one blood all nations of men for to dwell on all the face of the earth." They never continue, however, "and hath determined the times before appointed, and the bounds of their habitation; that they should seek the Lord, if haply they might feel after him, and find him, though he be not far from every one of us."

The emphasis today is on one world, one race, one church; but this is to be a world in rebellion against God ruled by Antichrist, a mongrel race in defiance of the separation which God has put up, and an apostate church, serving Antichrist.

College years are the time when young people make their life contacts, fall in love, and get married; and we do not believe intermarriage of the races is Scriptural. That such is the purpose of the whole present emphasis is apparent from a statement from one of the leaders of the NAACP who said,

"The racial problem will not be settled in the Courtroom but in the bedroom."

We accept a few Oriental students, but we do so with a definite understanding that they will not date outside of their own race. If we took Negro students here on this same basis today, they would resent that restriction and would cry that they were being discriminated against because they were not allowed to date Orientals or Caucasians. If we had to expel a black student today for the worst possible offense — stealing, attempted rape, or something of that sort — he could cry that he was being persecuted because he was black; and we would be picketed, annoyed, and harassed. The very attitude of the integrationist today makes it impossible for us to find any basis on which we can accept Negro students without violating Christian and Scriptural principles and without being put in a position where we could be harassed, annoyed, and threatened. The Board is not going to be put in any such position.

In this as in all matters, this institution seeks to do what we believe to be right, what we believe to be Scriptural, and what we believe to be in the best interest of the testimony of this institution and the welfare of our students. It is unfortunate that some Christians have been brainwashed by the propaganda of the integrationists to the point where they feel guilty if they do not integrate, when the truth is in most cases they should feel guilty if they do integrate on a basis that violates the boundaries which God has put up.

Letterhead of Bob Jones University

September 10, 1971

**A STATEMENT FROM THE CHAIRMAN OF THE
BOARD OF TRUSTEES AND THE PRESIDENT OF
BOB JONES UNIVERSITY.**

Bob Jones University has refused to accept Negro students because we believe that interracial marriage is contrary to the Scriptures; and to throw young people together during

their college years leads to romantic attachments and to marriage.

We have a number of Oriental students, but no student — Oriental or Caucasian — dates outside his own race. With the present agitation and left-wing pressures, blacks, if enrolled, likely would complain that such restrictions were discriminatory. If they attempted to violate our policy, they would have to be expelled. Then they would cry they had been dismissed because they were black.

It is unfortunate that this attitude on the part of some blacks makes it impossible for this Christian school to accept good blacks whom we would like to help. The Executive Committee, at a fall meeting, did authorize us to permit one fine young married black — a member of our staff — to be enrolled for a Bible class. This young man wants to train for Christian service. We permit white employees, who can work it into their schedules without interfering with their work hours, to take one course each semester. He is being given the same privilege that is extended to white members of the staff.

On the basis of the Executive Committee's feelings that the University could admit a married Negro without jeopardizing its convictions against interracial marriage, one black staff member has enrolled for one class.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

State of South Carolina
County of Greenville

PERSONALLY appeared before me Florence Post who, being first duly sworn, states:

I frequently make contributions to Bob Jones University,

Greenville, South Carolina. I plan to continue to make contributions to the University in such amounts as I am financially able to contribute. In making donations to the University, I have relied upon the advanced determination made by the Internal Revenue Service that the University is an exempt organization under the Internal Revenue Code and that I may deduct my contributions to the University in computing my federal income tax liability. Should the Internal Revenue Service revoke the tax exempt status of Bob Jones University or withdraw advance assurance that my contributions to the University will be deductible in computing my federal income tax liability, I will be forced to restrict or curtail my contributions to the University. The net effect of revocation of the University's tax exempt status or withdrawal of advanced determination of deductibility of contributions will be that the University will not receive contributions from me to the extent it would otherwise receive. Because of the frequency of my contributions to the University and my present plans for continuing frequent gifts to the University, the effect upon the University will be immediate.

(Signature and Jurat omitted)

Affidavits substantially identical to that of Florence Post were filed in support of Petitioner's Motion for Preliminary Injunction subscribed to by John McLario of Waukesha County, Wisconsin; A. L. Hayes of Mobile County, Alabama; Martin H. Bartlett of Otero County, New Mexico; Paul W. Doll, Jr. of Kings County, New York; Charles Baldwin of Columbia County, Florida; Arnold Fletcher Anderson of Dallas County, Texas; Evelyn Coffman of Fayette County, Ohio; Mrs. J. W. Stewart of Greenville County, South Carolina and Charles Loving of Franklin County, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION

State of South Carolina
County of Greenville

Personally appeared before me Jo Ann Hatcher, who first being duly sworn states and deposes:

I am donations secretary of Bob Jones University, Plaintiff in the above captioned matter, and as such, I maintain the books and records of Bob Jones University relating to the cash donations received by the University. The following is a list of the cash amounts received by Bob Jones University as donations on a weekly basis from August 30, 1970 to August 28, 1971:

<i>Week Beginning</i>	<i>Donations</i>
August 30, 1970	\$ 8,555.00
September 6, 1970	5,185.29
September 13, 1970	4,958.60
September 20, 1970	4,804.66
September 27, 1970	7,538.57
October 4, 1970	11,023.60
October 11, 1970	5,282.99
October 18, 1970	8,769.15
October 25, 1970	4,077.80
November 1, 1970	6,241.90
November 8, 1970	12,237.31
November 15, 1970	6,561.88
November 22, 1970	15,894.95
November 29, 1970	9,250.60
December 6, 1970	8,658.36
December 13, 1970	30,246.37
December 20, 1970	23,367.25

A-68

December 27, 1970	37,397.33
January 3, 1971	43,085.51
January 10, 1971	19,232.89
January 17, 1971	7,538.68
January 24, 1971	4,803.27
January 31, 1971	6,416.85
February 7, 1971	5,659.23
February 14, 1971	5,604.30
February 21, 1971	5,117.10
February 28, 1971	6,755.84
March 7, 1971	7,109.74
March 14, 1971	3,535.13
March 21, 1971	3,704.01
March 28, 1971	46,424.36
April 4, 1971	5,404.76
April 11, 1971	3,657.32
April 18, 1971	11,456.08
April 25, 1971	4,627.91
May 2, 1971	6,137.19
May 9, 1971	7,699.24
May 16, 1971	6,123.18
May 23, 1971	4,134.25
May 30, 1971	12,867.85
June 6, 1971	6,951.00
June 13, 1971	2,165.50
June 20, 1971	5,0006.31
June 27, 1971	5,308.47
July 4, 1971	9,096.73
July 11, 1971	3,868.39
July 18, 1971	6,222.02
July 25, 1971	2,281.30
August 1, 1971	4,837.57
August 8, 1971	4,087.16
August 15, 1971	9,180.88
August 22, 1971	4,424.45

A-69

During the period from September 1, to September 20, 1971, the University received a total of 691 individual cash gifts totaling \$29,695.83

Bob Jones University has received gifts from the Nationwide Foundation as follows:

May 18, 1967	\$100.00
June 16, 1967	\$25.00
October 2, 1967	\$100.00
December 6, 1967	\$300.00
December 27, 1967	\$50.00
May 4, 1968	\$350.00
April 19, 1969	\$100.00
October 6, 1969	\$300.00
December 20, 1969	\$100.00
April 24, 1970	\$150.00
July 1, 1970	\$300.00
August 10, 1970	\$50.00
November 6, 1970	\$50.00

That since November 6, 1970, Bob Jones University has received no donation from Nationwide Foundation although the University has requested that Nationwide Foundation make matching gifts to the University.

(Signature and Jurat omitted)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891**

**AFFIDAVIT IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

State of Tennessee
County of Fayette

Personally appeared before me Joe N. Cocke, who first being duly sworn states and deposes:

A-70

I am Chairman of the Board of Directors of Fayette Academy, Somerville, Tennessee. The Internal Revenue Service acting through the District Director, Atlanta, Georgia, revoked the tax exempt status of Fayette Academy first by withdrawing assurance of deductibility of contributions to the school and second by requiring the school to file Federal Income Tax Returns. The tax exempt status of Fayette Academy was revoked solely because it refused to publish as required by the Internal Revenue Service that it had adopted a racially nondiscriminatory admissions policy.

The school received a letter from the District Director of Internal Revenue, Atlanta, Georgia, dated January 12, 1971, a copy of which is attached. Subsequently, conferences were held at the District and National office. Officials of the Internal Revenue Service stated that the Service was irrevocably committed to revoking the tax exempt status of private schools which failed to adopt a racially nondiscriminatory admissions policy and publish that fact.

(Signature and Jurat omitted)

Leatherhead of Department of the Treasury

District Director Internal Revenue Service

Jan 12, 1971

411-1-3: WRG

Fayette Academy
Somerville, Tennessee 38068

Gentlemen:

By letter of December 3, 1970, you were notified of the suspension of advance assurance of the deductibility of contributions to your organization pending final determination of your status under Section 501 (c)(3) and 170 (c) of the Internal Revenue Code.

As you have not furnished evidence of adoption of a racially nondiscriminatory admissions policy, notice is hereby given of the proposed revocation of the ruling to your organi-

zation dated November 15, 1966, recognizing your exemption as an organization described in Section 501 (c)(3) of the Internal Revenue Code. This notice is in accordance with Revenue Procedure 69-3, Cumulative Bulletin 1968-1, 389. The undersigned has responsibility for the Southeast Region with respect to exemption rulings and revocations for organizations described in Section 501.

Your organization has the right to protest this proposed revocation by submitting a statement of the facts, law, and argument in support of your position. After filing your protest, you also have the right to a district office conference, which will be held at Memphis, Tennessee. You may, however, waive the right to a district office conference and request a referral of the matter directly to the National Office and request a conference there.

A conference at either the district or National Office would probably serve no useful purpose if you have no intention of adopting a racially nondiscriminatory admissions policy or unless you have additional information relative to this issue not submitted in previous correspondence or discussions.

If you intend to protest, it should be filed within 15 days from the date of this letter and should include a suggested date for the district or National Office conference, if one is desired. If you do not respond within 15 days, notice of revocation of the exemption ruling will be issued.

If you have any questions, please call our Exempt Organizations Group Supervisors, Mr. Earl J. Fillbach or Mr. H. W. Gustin, at 404-526-4516. Correspondence should be addressed to the address given above at Atlanta.

(Signature omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

AFFIDAVIT IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

State of South Carolina
County of Greenville

Personally appeared before me O. Jack Taylor, Jr., who first being duly sworn states and deposes:

I am one of the attorneys for Bob Jones University, Plaintiff in the above captioned matter. In the latter part of April 1971, University officials contacted me and requested that I write to Mr. C. B. Rogers, Staff Assistant, Office of Treasurer, Nationwide Foundation, concerning the tax exempt status of Bob Jones University. Pursuant to that request, I wrote to Mr. Rogers on April 23, 1971, a copy of my letter is attached hereto. In response to my letter of April 23, 1971, I received a letter dated April 26, 1971, from Mr. George W. Schmidt, attorney for Nationwide Foundation, a copy of which is attached. Mr. Schmidt advised that he would require written assurance from the Internal Revenue Service that any action the Internal Revenue Service might take concerning Bob Jones University's tax exempt status would be prospective only in operation before he could advise his client, Nationwide Foundation, to make matching gifts to the University. In response to Mr. Schmidt's letter of April 26, 1971, I wrote to Mr. Schmidt on April 29, 1971, forwarding to him Internal Revenue Service News Release Number 1052 and a copy of Testimony by Randolph W. Thrower then Commissioner of Internal Revenue before the Senate Select Committee on Equal Educational Opportunity, a copy of my letter and enclosures is attached hereto. In response to my letter of April 29, 1971, I received from Attorney Schmidt his letter dated May 3, 1971, a copy of which is attached with enclosure in which he states he cannot advise his client that it may make

a gift to Bob Jones University without possibly jeopardizing its own tax exempt status.

I am informed and believe that Nationwide Foundation has not made matching gifts to the University because of the threatened action of the Defendants. I am further informed and believe that because of said threatened action, Bob Jones University has been irreparably harmed and damaged because Nationwide Foundation has failed and refused to make gifts to the University which it would have otherwise made had not the Defendants threatened to revoke the tax exempt status of Bob Jones University. I am further informed and believe that the loss of such gifts and other gifts the University would expect to receive in the future can never be recovered by Bob Jones University.

(Signature and Jurat omitted)

Letterhead of Leatherwood, Walker, Todd, and Mann

April 23, 1971

Mr. C. B. Rogers
Staff Assistant
Office of Treasurer
Nationwide Foundation
246 North High Street
Columbus, Ohio 43216

Re: Bob Jones University
Greenville, South Carolina

Dear Mr. Rogers:

Please be advised that this firm is counsel for Bob Jones University, Greenville, South Carolina. The University has asked that we write to you confirming that the University presently enjoys tax exempt status under the Internal Revenue Code of 1954. Although as you are aware the Internal Revenue Service has questioned the tax exempt status of schools such as Bob Jones University. As of this date they have taken no action concerning the University's status. We have been assured by the Internal Revenue Service that any action taken

A-74

would be prospective in operation and not retroactive. Moreover, should the Internal Revenue Service take action adverse to the University it is contemplated that such action would be resisted vigorously.

I assume that with this information at hand you will be able to continue to make matching gifts. However, should you desire further information or clarification of the University's position, please advise. Thanking you for your attention and cooperation in this matter, I am

(Signature omitted)

LETTERHEAD OF HOWELL, WAGNER & SCHMIDT
COLUMBUS, OHIO

April 26, 1971

O. Jack Taylor, Jr., Esq.
Leatherwood, Walker, Todd & Mann
217 E. Coffee Street
Greenville, South Carolina 29602

Re: Bob Jones University
Greenville, South Carolina

Gentlemen:

We are counsel for Nationwide Foundation of Columbus, Ohio. Mr. C. B. Rogers of Nationwide Foundation has referred to us your letter of April 23, 1971, and prior correspondence regarding matching gifts by the Foundation to Bob Jones University.

Our concern is to preserve the tax-exempt status of Nationwide Foundation. As you know, ordinarily there is no problem if grants are made to an organization listed in the IRS Cumulative List of Organizations Described in Sec. 170 (c) of the Internal Revenue Code, and Bob Jones University is on that list. However, it was reported when the IRS announced its policy regarding segregated private schools that their exemptions might be revoked retroactively. See New York Times, July 11, 1970 edition, page 1. See also Treasury Info. Release No. 1041, dated August 19, 1970, indicating

problems for contributors who know of activities that result in disqualification.

Accordingly, if you have written assurance from the IRS that any action they may take will be prospective only in operation and not retroactive, please send me a copy. If it is satisfactory assurance, and barring any new developments by the IRS, I believe we can advise the Foundation it can make the matching gifts. In the absence of such written assurance, however, my opinion to Nationwide Foundation would have to be that the making of the matching gift might jeopardize its tax-exempt status.

(Signature omitted)

Letterhead of Leatherwood, Walker, Todd and Mann

April 29, 1971

George W. Schmidt, Esquire
Howell, Wagner & Schmidt
246 North High Street
Columbus, Ohio 43216

Re: Bob Jones University
Greenville, South Carolina

Dear Mr. Schmidt:

I have your letter of April 26, 1971, requesting written assurance from the Internal Revenue Service that any action they take against our client will be prospective only in operation and not retroactive. I am enclosing herewith Internal Revenue Service News Release No. 1052 which you will note in the next to the last paragraph states that the Service will allow deductions for contributions made prior to the date of the public announcement by the Internal Revenue Service of any revocation. I am also enclosing herewith a copy of Testimony before the Senate Select Committee on Equal Educational Opportunity by Randolph W. Thrower, Commissioner of Internal Revenue and call your attention to his statements on page 18 wherein he states that the position of the Internal Revenue Service will be applied prospectively rather than retroactively.

As of this date, the Internal Revenue Service has taken no action with regard to the University's tax exempt status and based upon the enclosed statements, we naturally assume that if any action is taken or attempted, that its effect will be prospective only.

Should you have any further questions concerning this matter, please advise. I am sure that with the information contained herein you will be able to advise your client that it could continue making matching gifts.

(Signature omitted)

The news release of the Internal Revenue Service dated July 19, 1970, attached to the Affidavit of O. Jack Taylor, Jr., has been reproduced previously in this Appendix at Page A-39.

Testimony
Before
The Senate Select Committee
On Equal Educational Opportunity
by
Randolph W. Thrower
Commissioner of Internal Revenue

I am pleased to accept your invitation to discuss before this Committee the recently announced position of the Internal Revenue Service, indeed of the present Administration, respecting the status for Federal tax purposes of private schools having racially discriminatory admissions policies. I will also direct myself to specific questions raised in your letters to me of July 21, July 31 and August 10, 1970.

At the outset of this discussion, it is essential that I outline the limited nature of the authority and responsibilities of the Internal Revenue Service insofar as private schools are concerned. Our responsibilities and our determinations begin and end within the confines of the Internal Revenue laws as interpreted by the rulings and regulations of the Treasury Department and the Internal Revenue Service and decisions

of the Federal courts construing the statutes or establishing constitutional limitations or directives. In short, the responsibility of the Internal Revenue Service is not to create new laws but simply as an administrative agency to implement and enforce the applicable laws.

The Internal Revenue Service neither grants nor denies exemptions. In the application of the statutory provisions for exemption and deduction of contributions with which we are here concerned, its function is to determine factually and legally whether a particular organization or a particular contribution comes within one of the prescribed classes of organizations or one of the prescribed classes of contributions described in such statutory provisions. This determination of the IRS is, of course, subject to review by the courts if an adversely affected organization or contributor wishes to contest it.

Under procedures followed by the Service for many years an organization claiming exemption under any of the exemption provisions of the Internal Revenue Code has been able to submit an application for a ruling from the Service that the organization qualifies for exemption. This is consistent with the ruling procedures and practices made available to individuals, business corporations and other entities under many other provisions of the Internal Revenue Code. See: Sec. 601.201 of the Statement of Procedural Rules, encompassing Rev. Proc. 69-1 through 69-6, C.B. 1969-1, pages 381 through 401. This practice, for example, gives taxpayers undertaking to carry on business operations or engage in financial transactions some degree of certainty as to the effect of specified Federal tax provisions upon those activities.

The Service currently is issuing rulings at the level of around 25,000 each year from the National Office and many more from the field. Some of these are favorable to the position sought by the applicants and some unfavorable. The greater part of these are "advance rulings" in the sense that they are prospective in scope, ruling upon transactions or operations expected to be carried out in conformity with the

assertions made in the request for the ruling. Copies of these rulings are sent to the District Director having territorial jurisdiction of the case and the facts on the basis of which rulings are issued are subject to verification in field examinations. Rulings on exempt organizations provide only a part of the total rulings process administered by the Service.

The procedures applicable to other taxpayers are generally followed with respect to requests by organizations for advance rulings on their exempt status. Rev. Proc. 69-3, C. B. 1969-1, 389. The applicants are expected to submit information as specified by the Service describing the nature of the objectives and operations of the organization claiming exemption, together with a certification by its responsible officers of its correctness. Where the Service, relying upon the information submitted, issues a favorable ruling to an organization of the sort to which contributions are deductible, the fact of the issuance of the ruling is published by the Service in its Publication 78 entitled "Cumulative List of Organizations Described in Section 170 (c) of the Internal Revenue Code of 1954." Until notice in the Internal Revenue Bulletin of the termination or revocation of the ruling, contributors may generally rely upon the ruling of exemption in deducting their contributions for Federal income tax purposes. In the absence of a favorable ruling, or despite an adverse ruling, the contributor may nevertheless insist upon the deductibility of the contribution and contest it in court if the Service does not agree. Likewise, an organization claiming exemption may contest an assertion of tax against it.

Educational institutions, as well as churches and other charitable organizations, have enjoyed a long history of privileged treatment under the common law as established in England and adopted in the colonies and the United States. Similarly privileged treatment of such institutions is found in earlier civilizations such as those of Rome and Greece, and in early Judaism, as well as in many other early cultures and religions.

This privileged status is reflected in the preferential tax treatment which has been accorded charities throughout much of the history of income, estate, inheritance, and property taxation in both England and this country, as well as many other countries. Typifying such preferential tax treatment in this country are the provisions of Sections 501(a) and 501(c)(3) of the Internal Revenue Code which extend exemption from income taxation to:

“Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.”

This provision, with its principal focus on religious, educational and other charitable institutions, came into modern federal income tax law with the very first general corporation income tax at the turn of the century. Section 38 of the Act of August 5, 1909, 36 stat. 112. There are a number of other classes of organizations which are accorded varying degrees of exemption from Federal income taxation. They range from civic leagues to labor organizations, and include such non-profit entities as trade associations, fraternal beneficiary associations, social clubs, and cemeteries, covering in all some eighteen categories.

A very important difference between the benefits under the Federal tax laws accorded religious, educational and other charitable institutions as contrasted with the other exempt organizations is in the deductibility of contributions to the former but generally not to the others. Under Section 170

and other provisions of the Internal Revenue Code, gifts and bequests to charities are deductible within certain limitations for Federal income, estate and gift tax purposes.

Under common law, the term "charity" encompassed all three of the major categories now identified separately under Section 501(c)(3) of the Internal Revenue Code as religious, educational and charitable. That Congress intended to adopt the broad common law concept of charities is shown in the Section 170(c) which expressly defines the term "charitable contribution" as including a gift to a corporation, trust, fund or foundation which is organized and operated exclusively for educational purposes. This understanding as to the adoption by Congress of the common law concept of charity is reflected in income tax regulations, published rulings of the Service and decisional law. See Section 1.501(c)(3)-1(d) (2) and (3) of the Income Tax Regulations; Rev. Rul. 67-325, C. B. 1967-2, 113, 116. See: *Henry C. Dubois*, 31 B.T.A. 239 (1934); *Horace Heidt Foundation v. U.S.*, 170 F. Supp. 634 (Ct. Cl. 1959); *The Founding Church of Scientology v. U.S.*, 412 F. 2d 1197 (Ct. Cl. 1969)

The incorporation of the common law concept of charity within these provisions of the Internal Revenue Code is highly relevant to our statement of position. An organization seeking exemption as being organized and operated exclusively for educational purposes, within the meaning of Section 501(c)(3) and Section 170, must meet the tests of being "charitable" in the common law sense.

The decision announced on July 10, 1970, rests upon the conclusion that under the basic principles of the common law of charities, applied in the light of today's knowledge and understanding, the Federal government can no longer legally justify the allowance of the financial benefits of tax exemption and, more importantly, the deductibility of contributions, to private schools which exclude qualified students solely on the basis of race. In this way, private education having these Federal tax benefits will be equally available to all without regard to race, whether white, black, Mexican American, American Indian, Oriental, Eskimo, Aleut or others.

During the past 15 months or so, and especially since the first filing of the complaint in *Green v. Kennedy and Thrower*, before a three-judge federal district court in the District of Columbia on May 21, 1969, the legal aspects of this issue have been studied in great depth within both the Treasury Department and the Department of Justice, and both departments are in accord with the statement of position and believe that it will be upheld in the courts.

We fully appreciate that opinions may differ as to the ultimate outcome of judicial review of the tax status of schools having racially discriminatory admissions policies. The position being taken by the Internal Revenue Service will permit a testing of this issue by the courts in cases where the adversely affected school or one of its contributors is involved as a party at interest.

Your letter of July 21 asks in particular "the ways in which it (the new position) will be implemented and the extent to which monitoring or investigation will be utilized." Our plans for implementation are generally described in the press releases of the Internal Revenue Service dated July 10, 1970, and July 19, 1970, which we have submitted to the Committee.

My response to your question will refer generally to three principal categories of schools, as follows:

1. Schools currently applying for rulings (excepting those in Mississippi).

2. Schools which have secured favorable rulings in the past (excepting those in Mississippi).

3. Schools in Mississippi currently applying for rulings (numbering 13) or which have received rulings in recent years (numbering 41), both of which are now covered by orders of the court in *Green v. Kennedy*.

As stated in our press release of July 10, 1970, we are proceeding without delay to issue favorable rulings where we are assured that a private school (not in Mississippi) has adopted and is announcing to the public a racially nondiscriminatory admissions policy. This is based on representa-

tions of fact made to us in writing by responsible officers of the school setting forth its admissions policy and the publication of this to the public. We are currently following the practice of advising the news media of the issuance of the favorable ruling with the expectation that this will provide additional publicity, at least within the locality, of the IRS action and the existence of the racially nondiscriminatory admissions policy. As previously explained, it is in accordance with our usual procedures in issuing advance rulings to accept the taxpayer's factual representations upon which the ruling is based, subject to subsequent examination in the field.

Favorable rulings given to private schools in the past will remain outstanding where the school is able to show that it has racially nondiscriminatory admissions policies. As was also stated in that press release, and I quote:

All private schools with favorable rulings outstanding will receive a written inquiry from the District Director of Internal Revenue and it is anticipated that in most instances evidence of a nondiscriminatory policy can be supplied by reference to published statements of policy or to the racial constituency of the student body.

Where a school fails to establish that it has a racially nondiscriminatory admissions policy, an outstanding ruling of exemption will be withdrawn. However, a school seeking to clarify or change its policies and practices will be given a reasonable opportunity to do so in order to retain its ruling of federal tax exemption. In any event, full opportunity to present evidence and be heard will be provided in accordance with usual revenue procedures and the right to appeal to the courts will be available. Similar principles will be followed in acting upon requests made by new schools for rulings.

We are undertaking to apply these policies in an even-handed manner throughout the United States to both estab-

lished institutions and new schools currently making applications. We now estimate very conservatively that there are not less than 17 or 18 thousand private schools within the United States presently enjoying a tax exempt status recognized in favorable rulings previously issued by the Internal Revenue Service. Of these 17,000 or more schools, 5,000 or more have favorable rulings of exemption directed to that school alone and the remainder are covered by group rulings issued to a sponsoring organization such as to the Catholic Church.

Our files do not now contain information sufficient to permit a determination as to the admissions policies of these schools and thus an inquiry will be directed to each of them or its sponsoring organization. Moreover, since this is a newly developed position which was not suggested as a condition at the time of the earlier rulings on the exempt status, we have concluded, in accordance with our usual policies, that the new position should be applied only prospectively. It would also follow from this that, where necessary, a school should be given a reasonable opportunity to clarify or modify its policies and practices so as to come into compliance for the future.

In implementing this statement of policy with respect to pending applications, we have moved as expeditiously as possible because action on many of these applications was delayed while our former position was under review. Until the new position was developed, we were not certain as to what information would be required to process these applications and thus were not able to have all of this information on hand for action on July 10. Consequently, we promptly advised these applicants of the new requirements and have invited telephone inquiries from the schools where they were in doubt as to what they must submit to show that they were in conformity with the new position. On July 10,

1970, we had pending in the National Office 136 applications which possibly involved this issue and which had been forwarded to the National Office by the Districts. Since July 10 we have acted favorably on 7 of these applications.

Your letter of July 31 states that you are "particularly interested in the tax exemptions granted to six private schools on July 19" and you specifically state: "In order that we might gain some understanding of your new policy and procedures, please inform the Committee, at least one week in advance of your testimony: (1) whether these schools operated with racially discriminatory admissions policies during the last school year; (2) whether these schools were 'segregation academies' established to circumvent public school desegregation, and (3) what steps each school was required to take in order to obtain an exemption." Your letter continues: "In addition, I would appreciate your supplying the Committee, at the same time, with the correspondence between the IRS and these schools relating to the recent ruling." Your more recent letter of August 10 extends this to the seventh school on which we acted favorably, and asks for additional information applicable to all schools.

In view of the limited time which has been available and the demands on our personnel working in this area in implementing the policy as outlined above, and in responding to inquiries from Members of Congress and other sources, it was not possible for us to supply the information as early as you requested. However, this material was submitted along with advance drafts of this testimony.

The seven schools to which we issued favorable rulings were:

DeSoto School, Inc.
Helena, Arkansas

Southeast Education, Inc.
Dothan, Alabama

The Heritage School, Inc.
Newnan, Georgia

Holly Hill Academy, Inc.
Holly Hill, South Carolina

Nathanael Greene Academy
Siloam, Georgia

Pamlico Community School
Washington, North Carolina

The Gaffney Day School
Gaffney, South Carolina

The DeSoto School intends to begin operations in September 1970. Its bylaws state that "Applications shall be received and considered without regard to religious affiliation, race or nationality." This fact has been publicized within the community. As in all of the other cases, and as will now be our usual policy, the favorable ruling and the basis upon which it was issued will be released by the IRS to the news media of the immediate area.

The Heritage School, Inc., also expects to begin operations in September 1970 and has otherwise met our requirements. We were advised that the school intends to accept students of all races and the Newnan Times Herald of March 5, 1970, publicized an article, obviously released by the school, which included the statement: "Student enrollment, without regard to race, creed, color, or national origin, will begin when the headmaster takes office." We were assured by Dr. William L. Pressley, an eminent school administrator, who has recently appeared before this Committee and who has advised with the organizers of this school, that the school does intend to administer an open-door admissions policy in good faith and hopes to have applications from qualified Negroes as well as whites.

Our basis for a favorable ruling on the application of Southeast Education, Inc., is similar to that for the DeSoto School and the Heritage School. The operation of Houston Academy by Southeast Education, Inc., is to begin in September 1970. We had been advised in December 1969 that the school had a racially nondiscriminatory admissions policy and that this had been made known to the citizens of the community. Before the issuance of the ruling we were assured that this would be further publicized within the community in the specific language of the IRS statement of position.

Nathanael Greene Academy, Inc., began operations during the past school year with only white students in attendance. No Negro students applied. We were advised that the Academy in its first year of operation had adopted no rules or policies designed to prevent enrollment of any member of a minority group. On the other hand, it had not then affirmatively adopted an open-door admission policy. We are now advised in writing by the chairman of the board of trustees of that school that the board has now adopted a racially nondiscriminatory admissions policy which is being published in the town's weekly newspaper.

The basis for our action regarding The Gaffney Day School is similar to that for the Nathanael Greene Academy. The Gaffney Day School operated during 1969 with only white students. Its opening was known in the community and it received no applications from Negro children. We were assured that the board of trustees of the school had "instructed the headmistress from the very beginning to process all applications in the same manner without regard to race." It has asserted that it does not have a racially discriminatory admissions policy and, in fact, that it has already ordered the printing of brochures specifically stating that students will be accepted without regard to race. We are also assured that the brochures will be distributed "as widely as possible" and that advertisements to this same effect will be made in the local paper.

The Pamlico Community School of Washington, North Carolina, has similarly assured us that, although it has operated for a year with only white students, it does not have a discriminatory admissions policy and has widely publicized its existence and availability within the community. It has had no applications from Negroes. We are assured that the school does not have a discriminatory admissions policy, that it will accept enrollment of qualified Negro applicants and that its racially nondiscriminatory admissions policy will be published in the local newspaper.

Holly Hill Academy of Holly Hill, South Carolina, ran

legal notices in its local papers on February 19 and February 21, 1970, of a legal meeting to be held for the purpose of organizing the Holly Hill Academy, Inc. "to operate a system of elementary and secondary schools for the education of children of all races and creeds." It incorporated on March 4, 1970 "to promote, own and operate a system of elementary and secondary schools for children of all races and creeds." The 1970-71 school term will be its first year in operation. By letter of July 20, 1970, the school again advised us that the school "is open to qualified students of all races and creeds." It stated that the number of students seeking enrollment to date is 211, and added: "To reach capacity the Academy will advertise in the local papers, notifying the public of openings, and advising the nondiscriminatory admissions policy."

Your letter of July 31 asked also that I advise the Committee as to whether these schools were "segregation academies" established to circumvent public school desegregation. The implementation of the program which we have outlined for schools organized prior to the date of our statement of the new position does not make our ultimate determinations dependent upon the earlier motivation for the formation of the school. This applies equally to those seeking rulings and to the 17,000 schools which already had favorable rulings. In accordance with our usual policy at the administrative level, we are applying our new position prospectively rather than retroactively, whether the schools were opened a year ago or 200 years ago. The policy of nonretroactivity in the application of our tax laws has repeatedly been recognized in legislation by the Congress and, of course, reflects elementary concepts of fair play. Thus, any school, regardless of what its policies and practices may have been, will be given a reasonable opportunity to make such changes in its policies and practices as will permit it to conform to the new position. Consequently, we have not at this time made an effort to determine the motivation for the formation for the seven schools about which you specifically inquired.

I do not mean to suggest by the foregoing that the prior history of a school would under no circumstances be relevant to a determination on our part of its tax exempt status. We certainly hope that any school, which gives the IRS formal assurance in writing over the signature of its responsible officials that it has adopted and will in good faith administer a racially nondiscriminatory admissions policy, is not acting with undisclosed reservations, and will not depart from this commitment in the future. Where we receive complaints raising serious questions as to whether the commitment is being followed in good faith, in appraising the entitlement of the school to continued exemption, it may become relevant to take into consideration the entire history of the institution in order to gain the best possible understanding of the character of its operation at a particular time.

It is not possible to be much more specific about our plans until we get a better grasp of the dimensions of the problem. At the present time we do not know to what extent schools may now have racially discriminatory admissions policies nor to what extent those having such policies will change them in order to conform with the new position. We believe that the most constructive reaction to our new position will be for such schools to conform.

Before closing my prepared statement, and in order to provide for the Committee a full understanding of the present status of private schools under the tax laws, special comment must be made about Mississippi schools which have been made the subject of court orders entered by the court in *Green v. Kennedy and Thrower*.

By orders of the court issued on January 12, 1970, and June 26, 1970, the Service was required to secure court approval for any favorable actions proposed to be taken on pending Mississippi applications and to withdraw assurance of deductibility of contributions to 41 private schools which had received such rulings in Mississippi from 1963 through June 30, 1969. More specifically, the order of January 12, 1970, enjoined the defendants from approving any further

application for exemption by any private school located in the state of Mississippi enrolling students in any of the grades one through twelve, or determining that contributions to such schools were deductible, unless the defendants "first affirmatively determine pursuant to appropriate directives and procedures 'satisfactory to this Court' that the applicant school "is not a part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated public schools." By further order of June 26, 1970, the defendants were ordered that they should "forthwith order, pursuant to the procedures of Rev. Proc. 68-17, 1968-1 C. B. 806 or similar proceedings providing for notice to the public and to all affected schools, the suspension of the advance assurance of deductibility of contributions" for 41 private schools in Mississippi which had received favorable ruling letters since 1963. The defendants were further ordered to "continue such suspension of advance assurance of deductibility of contributions for such schools" unless they "first affirmatively determine pursuant to appropriate directives and procedures satisfactory to this Court that the school whose advance assurance of deductibility is suspended is not part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated public schools."

We have before us at the National Office applications for tax exemption from 13 private schools in Mississippi covered by the Court's order of January 12, 1970. We are inquiring from those schools whether they intend to conform to the new statement of position. In addition, we have notified the 41 Mississippi schools of the nature of the court's order of June 26, 1970. We described the requirements of the court's order and of our new statement of position and gave each of the 41 schools an opportunity for a conference with district and National Office representatives in Jackson, Mississippi. Through August 10, 1970, conferences had been held with 26 of these schools.

One of these 41 schools has stated that it is already in

conformity with our position and four have stated that they have adopted and will publicize a racially nondiscriminatory admissions policy and will within a week or two furnish us with a copy of the publication.

We found that two of the schools were no longer in existence.

Eight of the 41 schools asserted that they would not conform with the statement of position and, pursuant to the orders of the court, letters suspending advance assurance of deductibility are being issued to these schools. A typical letter of suspension following our usual form has been supplied to the Committee.

Sixteen of the schools indicated that they were not prepared to give a definite answer and would have to consult their boards of directors. They were advised to notify the IRS within 30 days of their decision and to submit evidence of publication of a new policy if one were adopted.

When these determinations are concluded as to each of the 41 schools, they will be reported to the district court.

We were asked by some Members of Congress and others to give expeditious attention to the request of the Piney Woods School of Piney Woods, Mississippi, that it be formally advised that its tax exempt status, approved in 1941, would not be adversely affected by the new statement of position. After the receipt of information from the school on its admission policies we were able, on July 24, 1970, to advise the school in writing that it met the standard set forth in our statement and that its favorable ruling would be left undisturbed. It was indicated that the school has a student body of about 350, with 25 Mexican-American, two white and the remainder Negro. The faculty consists of both white and Negro teachers. The school charges no tuition and was concerned about getting immediate approval because of its dependency upon contributions from throughout the nation.

This completes my prepared statement and I trust that it answers all of the questions indicated in your letters and gives you an over-view of our plans for implementing the

statement of July 10. I will be happy to answer any questions which members of the Committee may have.

LETTERHEAD OF HOWELL, WAGNER & SCHMIDT
COLUMBUS, OHIO

May 3, 1971

O. Jack Taylor, Esq.
Leatherwood, Walker, Todd & Mann
217 E. Coffee Street
Greenville, South Carolina 29602

Re: Bob Jones University
Greenville, South Carolina

Gentlemen:

Thank you for your letter of April 29 and copies of IRS News Release No. 1052, July 19, 1970, and copy of Testimony by Commissioner Thrower before the Senate Committee.

I certainly wish that this information would settle the matter so that Nationwide Foundation could make a contribution without possibly jeopardizing its own tax-exempt status. However, I do not feel that this is the case.

In my opinion IRS Announcement 71-31, published in Internal Revenue Bulletin No. 1971-15 (April 12, 1971) copy enclosed is more to the point. The problem is that the IRS has stated in this Announcement and in TIR 1041 which I referred to in my letter that assurance of deductibility of contributions to an organization named in the IRS Cumulative List does not extend to persons who know of activities that result in disqualification of the organization. It seems clear to me that the admission policy of Bob Jones University which has been made known to us, is in conflict with the IRS position in this matter. Therefore, in my opinion, Nationwide Foundation's tax-exempt status might be jeopardized by making a contribution to the University. I am sure that you will agree with me that maintaining the tax-exempt status of our organization is of even greater importance and consequence than the deductibility of a contribution by an individual or corporation.

We probably both know of a number of cases where the IRS has attempted to revoke tax-exempt status retroactively. At least I have had that experience. I do not interpret Commissioner Thrower's statement to mean that the IRS position will not be applied retroactively in any manner. Rather, I think that all he was saying was that a school which had in the past a restricted admissions policy but changed it to an open admissions policy, would not have its exemption revoked. However, this is not your case.

In view of the above, I regret that I cannot advise Nationwide Foundation that it may make a gift to Bob Jones University without possibly jeopardizing its own tax-exempt status.

(Signature omitted)

Suspension of Advance Assurance of Deductibility of Contributions Announcement 71-31

The Internal Revenue Service can no longer give advance assurance of deductibility of contributions to Fayette Academy, Somerville, Tennessee. The withdrawal is effective for gifts made after April 12, 1971.

This suspense action is taken under the standards announced by the Service on July 10, 1970, which called for the adoption of racially nondiscriminatory admissions policies that are made known to the community served by the school. The Academy was found not to be in conformity with these standards and not willing to conform and consequently has been notified of the Service action.

Prior to the suspension action, the Service gave the Academy an opportunity for administrative conferences in accordance with its rules and procedures for tax exempt organizations.

Ordinarily, a person is assured of deductibility of contributions to a tax exempt organization named in the published list of organizations described in section 170(c) of the Internal Revenue Code of 1954. However, this assurance does not

extend to persons who know of or are responsible for activities that result in disqualification of the organization. The object of the action described herein is to withdraw the assurance of deductibility of contributions made to the Academy pending a final determination of its status under section 501(c)(3) of the Code.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

Greenville Division

Civil Action No. 71-891

Washington, D.C.

Thursday, September 30th, 1971

Deposition of WILLIAM H. CONNETT, Assistant to the Commissioner of Internal Revenue, a witness of lawful age, taken on behalf of the plaintiff in the above-entitled action, pending in the District Court of the United States for the District of South Carolina, Greenville Division, pursuant to Order, before Caroline H. Connelly, a notary public in and for the District of Columbia, in the offices of the Internal Revenue Service, Room 3302, Internal Revenue Service Building, 1111 Constitution Avenue, Northwest, Washington, D.C., at 1:35 p.m., Thursday, September 30th, 1971.

APPEARANCES:

On behalf of the Plaintiff:

LEATHERWOOD, WALKER, TODD & MANN

By: Fletcher C. Mann, Esquire

217 East Coffee Street

Greenville, South Carolina 29602

On behalf of the Defendants:

STANLEY F. KRYSA, Esquire

and

JOHN J. McCARTHY, Esquire

Tax Division

Department of Justice

Washington, D.C.

Mr. Krysa: May we have a stipulation that all objections except as to the form of the question can be reserved until the time —

Mr. Mann: That's what the rules say. This deposition may be tendered or offered for any purpose.

How about signature, reading and so forth?

Mr. Krysa: Do you want to read it?

We won't waive signature.

Thereupon,

WILLIAM H. CONNETT, a witness of lawful age, was duly sworn by the notary public, and being examined by counsel, testified as follows:

Direct Examination

By Mr. Mann: Mr. Connett, you occupy the position of Assistant to the Commissioner of Internal Revenue of the United States?

A. That's correct.

Q. In that capacity I believe that you are the principal spokesman for the Commissioner on matters relating to the

administration of the Exempt Organizations Provisions of the Internal Revenue Code?

A. Yes, I am.

Q. How long have you served as Assistant to the Commissioner of Internal Revenue?

A. Since December of 1970.

Q. December of 1970?

A. Yes, sir.

Q. All right, sir. Now then are you aware and were you made aware that upon assuming that position that during July of 1970, the Internal Revenue Service had formulated a position with respect to the continuance of tax exempt status of private schools which maintain a racially discriminatory policy?

A. I was made aware of that position.

Q. I believe that in the action which is here pending that you have heretofore prepared and submitted an affidavit, have you not, sir?

A. Yes, I have.

Q. Attached to that affidavit is a copy of a news release issued by the Service, by Internal Revenue, on or about July the 10th, 1960, or 1970, I am sorry.

Mr. Krysa: It's Exhibit A attached to the affidavit, I believe.

The Witness: Yes, that's correct.

By Mr. Mann: And does that Exhibit A attached to your affidavit correctly set forth and state the position of the Internal Revenue Service with respect to the tax exempt status of private schools?

A. It does in a fairly simplistic fashion. The news release was modified on July 19th by way of clarification.

Q. Thereafter on or about November the 30th of 1970, as shown by Exhibit B attached to your affidavit, a letter was sent by Internal Revenue Service to Bob Jones University, the plaintiff in this action?

A. That's correct.

Q. Now according to the news release and the letter sent to Bob Jones University, it was stated that the Internal Revenue Service had concluded that private schools with racially discriminatory admissions policies are not legally entitled to Federal Tax exemptions, is that correct?

A. Yes, sir.

Q. Is that the policy as established by the Internal Revenue Service?

A. Yes, sir.

Q. In addition to this, not being entitled to the tax exemption, it is also the policy of Internal Revenue that contributions made to such schools are not deductible by the contributor for tax purposes?

A. That's correct.

Q. And that is the present and existing policy of the Internal Revenue Service?

A. Yes, it is.

Q. Now, Mr. Connett, you have had occasion to be present, I believe, during conferences concerning the admission policies of Bob Jones University, have you not?

A. Yes, sir.

Q. In addition, there have been supplied to you copies of their admissions policies and statements relative to those policies, have there not?

A. Yes, there have been.

Q. And based upon those conferences and the information supplied to you, you are aware, are you not, sir, that Bob Jones University does not admit black students to its student body?

A. I have just recently been shown an excerpt from a newspaper article from Greenville indicating that Bob Jones University has admitted a black student.

Q. Sir, prior to that time, you were aware that they did not admit black students?

A. Yes, sir.

Q. And this matter was made known to you and to the Commissioner of Internal Revenue?

A. Yes, we were told that in discussions.

Q. Both the present Commissioner, Mr. Walters, and his predecessor, Mr. Thrower, were advised in that respect, were they not?

A. Mr. Walters was advised by myself and other members of the Service. I wasn't present in conversations between him and representatives of the University.

Q. All right, sir. Now, Mr. Connett, have you discussed the Bob Jones University exempt status and admissions policies with other officials in the Internal Revenue Service?

A. Yes, I have.

Q. And with whom have you discussed that admissions policy and the tax exempt status?

A. I have discussed the question with former Commissioner Thrower, present Commissioner Walters, Chief Counsel Worthy, representatives of the District Directors' Office in Atlanta, Georgia, the Chief of the Exempt Organization Branch of the Audit Division in the National Office of Internal Revenue Service.

Q. Have you received any memorandum or orders or documents from the Commissioner or from any of the individuals that you have named concerning either the admissions policy or the tax exempt status of Bob Jones University?

A. Did your question refer to only written material or also oral material?

Q. Oral or written.

Mr. McCarthy: Let's break that question down into two parts.

By Mr. Mann: All right, first with respect to written material?

A. No, no written material.

Q. All right, sir, have you yourself prepared any memorandum or directive or document or instructions in writing with respect to either the admissions policy or the tax exempt status of Bob Jones University?

A. Sometime in the last three weeks or thereabouts, I

prepared a memorandum to Honorable Chief of the Exempt Organization Examinations Branch, or the Assistant Commissioner of Compliances advising that because of the pending litigation of the Bob Jones University suit, no action should be taken to process the University's reply to the November 30th letter and questionnaire.

Q. Were there any prepared by you prior to that time?

A. No.

Q. All right, sir. Now have you received any oral communications from any of the individuals in the form of directives or memorandums or otherwise, instructions regarding the tax exempt status of the Bob Jones University?

A. Sometime, in approximately February roughly, and I'm not sure if it was February or March, Mr. Thrower, then Commissioner Thrower, advised me that Bob Jones was considering the possibility of complying with the Service position and asked me to insure that the District Director did not proceed with processing of the questionnaire response until we had had a chance to explore the matter more fully.

Then following the meeting with representatives of Bob Jones University in May 1969, I believe it was, Mr. Thrower again advised me that I should ask the District Director to hold processing of the questionnaire in abeyance. He also told me that I would be called by Wesley Walker who would advise me of the decision of the University regarding the admissions policy.

Q. All right, sir. Now have you —

A. No, I'm not finished.

Q. I'm sorry, pardon me. I didn't mean to cut you off.

A. When Wesley Walker called and informed me that the University was not inclined to change its admission policy, I advised Commissioner Walters and the agreement in our discussion was that I would advise the District Director to proceed to process the questionnaire response.

Subsequently, Mr. Commissioner Walters advised me he had been contacted by you, Mr. Mann, and asked me to advise

the District Director to again withhold any action pending further advice.

Q. Had you in the interim advised the District Director in Atlanta or elsewhere to proceed with the processing of this matter that you referred to?

A. As it happens, when I spoke to Wesley Walker on the phone, I was in Atlanta and following the telephone conversation with him, when I told him that the District Director would proceed to process the questionnaire response, I then, following the conversation, notified the District Director's representative of the conversation.

Q. And to proceed with the processing of that response?

A. Yes, sir.

Q. And that would take what form, sir?

A. The present procedure is that the District Director's representative would contact the school or its representatives and offer the school or its representatives the opportunity of a conference.

His purpose at the conference would be to make sure that the school fully understood the Service's position and the steps that would be necessary for the University to comply with that position.

If the conference concluded with the University indicating that it would not comply with the requirements of a racially non-discriminatory admissions policy, the District Director would issue a letter to the University stating, (1), that he was proposing to recommend that the ruling recognizing an exemption be revoked and, (2), that the ruling ensuring deductibility of contributions be suspended insofar as advance assurance of deductibility of contributions is provided.

Q. All right, sir. Now Mr. Connett this form that you have referred to was in the process of preparation to be sent to Bob Jones University?

A. No sir. First, the representatives in the normal course of handling of the case, and I don't know how long that would

have taken, but they would have contacted the school presumably by telephone and tried to arrange a conference to discuss the matter before a notice was provided.

Q. All right, sir. Now is it not true that under the position that has been adopted by the Internal Revenue Service the admission policy of Bob Jones University, which would not admit a black student, without regard to any other factors involved, would that, or would it not result in a revocation by the Internal Revenue Service of its tax exempt status?

A. It would result in the District Directors' proposing revocation. If when the final action were reached following protest and conference, the University had a racially discriminatory policy and the Service's position were the same as it is today, the Service position would be to revoke the recognition of exemption.

Q. Then unless, as I understand your statement, unless Bob Jones University chose the admissions' policy as you understood it at the time when under the position of Internal Revenue, its status, its tax exempt status would be revoked?

Mr. Krysa: I object to the form of the question. I don't believe that is his position. There is another element in there that you have left out — if the law doesn't change.

By Mr. Mann: All right, under the existing law, as you interpret it —

A. If under the existing law — let me start over.

Under the existing position of the Service, if a decision is made today on a case and the school in that case has a racially discriminatory admissions policy, the Service's position is that the school does not qualify for recognition of exemption or the right to receive deductible contributions;

Q. So that it would lose not only the tax exempt status but the contributors would lose their tax deductibility of any contributions made to that institution?

Mr. Krysa: Object to the form of the question.

By Mr. Mann: All right, sir. Mr. Connett, under the position which is presently adopted by the Internal Revenue Serv-

ice, any school, private school, in the United States which maintains according to your interpretation, that is the Internal Revenue Service's interpretation, a racially discriminatory policy, will lose the tax exempt status?

Mr. Krysa: I object and I don't think he should be required to answer that. The Order here describes the scope of your entire vision and now you're going into any school in the country.

By Mr. Mann: All right. Will Bob Jones University lose it?

Mr. Krysa: He has already answered the question. We object to the form of the question.

Mr. Mann: And what was your answer to it?

Mr. Krysa: Do you want to have your answer read back?

The Witness: Yes.

(Whereupon, the answer was read back by the reporter.)

Mr. Krysa: That is your answer with respect to Bob Jones University.

By Mr. Mann: If the decision were being made today in the Bob Jones University case and Bob Jones University has a racially discriminatory policy, the Service's position would require revocation of admission of exemption and withdrawal of the right to receive deductible contributions.

All right, sir, if such is the position, if Bob Jones University maintained an admissions policy that excludes black students, under the existing regulations in effect at the Internal Revenue Service, its tax exempt status would be revoked without regard to the number of administrative hearings which might be held, is that correct, sir?

A. If the exclusion of blacks is based solely on race, the present position of the Service would require revocation of recognition of exemption.

Q. If the exclusion of blacks is predicated on religious

principles and not solely on race, what is the position of the Service then?

Mr. Krysa: I object, and I don't think he needs to answer that question. It's beyond the scope of the Order.

Mr. Mann: Well, I'm asking the question; are you instructing him not to answer it?

Mr. Krysa: Yes.

By Mr. Mann: Mr. Connett, are you aware that the Service has recognized the exclusion by Bob Jones University of members of the black race upon religious principles?

A. I am not.

Q. You are not aware? Is there any exception recognized by the Internal Revenue Service to the exclusion or to a racially discriminatory policy by private institutions?

A. I am not aware of an exception to the conclusion based solely on race. The news release, as I recall, indicated that exclusion was permitted on other grounds not racial in nature.

Q. What part of that release relates to such?

A. The July 1970 news release states that selectivity of students by a religious seminary having no relation to racial discrimination would not be inconsistent with the IRS statement of position.

Q. The news release of what date?

A. July 19th, 1970. The news release also said and I quote, "The IRS said its July 10th statement does not affect a school's ordinary admissions policies which have no relation to race."

Q. Do you have a copy of that release that you are reading from?

A. Yes.

Q. All right, sir; now in this release it's stated, "The IRS said its July 10th statement does not affect a school's ordinary admissions policies which have no relation to race."

What is your interpretation of that statement?

Mr. Krysa: I object to the form of the question and object to the question on the basis that it is completely outside of the scope of the examination allowed and I direct the witness not to answer it.

By Mr. Mann: Mr. Connett, what is the purpose of the IRS policy with respect to revocation of the tax exempt status of private schools which practice racial discrimination?

Mr. Krysa: Same objection and again instruct the witness that he is not required to answer by virtue of the scope of the Order allowing his deposition.

Mr. Mann: Now we may as well adjourn. We'll just have to go to the Judge and get him to answer this.

Mr. Krysa: You never have asked the questions I would allow him to answer.

Mr. Mann: I certainly haven't.

Mr. Connett will just have to come back.

Mr. Krysa: Can we ask a question?

Mr. Mann: All right, if you want to.

Mr. Krysa: Has the National Office ever determined or made a decision to revoke the ruling recognizing the tax exempt status of Bob Jones University?

The Witness: It has not.

Mr. Krysa: That was all.

By Mr. Mann: Had you issued instructions to the District Director in Atlanta, Georgia to begin the process of the revocation of the tax exempt status of the Bob Jones University?

A. No, at one time —

Q. All right, sir, go ahead.

A. At one time following the discussion with Wesley Walker I advised the District Director's representative to proceed to process the questionnaire response.

Q. And that was stopped when this action was instituted?

A. Yes, sir.

Q. Prior to the institution of this action, instructions had been given to begin the process for the revocation of the tax exempt status, had it not?

A. No, sir, to process the questionnaire response.

Q. Which leads to the revocation of the tax exempt status?

A. Which might or might not, depending on the facts in the case.

Q. All right, sir, what facts in your opinion, other than a change in the admissions policy of Bob Jones University, would change that ruling?

Mr. Krysa: Object to the form of the question, on the basis that the question calls for an answer outside of the scope of the Order and I advise the witness he is not required to answer that.

Mr. Mann: We would like to make an objection on the continuing objections and instructions not to answer when this is the very meat of the question — of the Order itself.

By Mr. Mann: Mr. Connett, you have indicated that you did advise the District Director in Atlanta to begin the process that would lead to the revocation of the tax exempt status?

A. I don't believe that I had, Mr. Mann. I thought that my answer was that he was instructed to proceed to process the questionnaire response.

Q. Yes, sir, and regardless of how many administrative hearings or processes or procedures you went through, unless Bob Jones University changed its admission policy, under the rulings alleged by the Internal Revenue Service, its tax exempt status would be revoked, would it not?

A. I really don't know, Mr. Mann. It seems to me that it would depend on the state of the law at the moment when the final decision was made.

Q. As the law stands as of this moment?

A. If the decision were made today?

Q. Yes.

A. If you were to assume for purposes of discussion that Bob Jones University had a racially discriminatory admissions policy, the present position of the Service would require, I believe, loss of exemption.

Q. And loss of deductibility on contributions?

A. Yes, sir.

Q. Are you aware of any foreseeable change in the law as the Internal Revenue Service now interprets it?

A. My impression is that in one case, in the case of Green versus Connally, the intervenors had appealed to the Supreme Court.

Q. But you were not aware of any anticipated change or change of the interpretation as now contemplated by the Internal Revenue Service?

A. None other than what would be brought about by a change in judicial findings.

Q. All right, sir. What is the form of the letter that would be sent by the District Director to Bob Jones University with respect to the institution of these administrative procedures?

A. As I mentioned earlier, the first step would be a telephone call presumably and the offering of an opportunity of a conference to discuss the possibility of compliance. Following —

Q. Just a minute. Assume they got the telephone call and Bob Jones University says, "We're staying with the admissions policy we have". Now what is the next procedure?

A. The next proceeding would be to issue a notice to the University advising the University that the District Director proposed to recommend that the revocation — I beg your pardon — proposed to recommend that the recognition of exemption ruling be revoked and further that the District Director was proposing to recommend that advance assurance of deductibility of contributions to the school be suspended.

Q. All right, sir, and assume upon receipt of that letter, Bob Jones University says, "We'll maintain our admissions policy". What then happens?

A. The letter requests the school to indicate whether it protests the proposed ruling, or proposed suspension of advance assurance and that it indicate if it wants a conference in the District office, the opportunity to file a brief in the District office or a conference in the National office.

Q. All right, sir, let's assume at this point that Bob Jones University says, "We maintain our admissions policy but we protest the action of the Internal Revenue Service". What then happens?

A. The District Director would ask whether the University wants a conference in the District office.

Q. If it says, if it desires no conference, what happens?

Mr. Krysa: Let me see if I understand your question to the witness. When you say, "We maintain the admissions policy", that means to exclude blacks solely on the basis of race? Is that what you mean by "admissions policy"?

Mr. Mann: No, sir.

Mr. Krysa: Maybe the witness would like some clarification on what exactly you do mean.

By Mr. Mann: Bob Jones University adopts the position, predicated upon its religious beliefs that it will not admit black students. Predicated on that admissions policy.

A. If I could have further clarification — they won't admit black students by reason of race rather than for some other reason. Is that the hypothesis?

Q. The hypothesis is that, based and predicated upon their religious purposes, they maintain a position by which black students are not admitted to the University — unmarried black students are not admitted to the University.

Mr. Krysa: I object again on the basis that the question calls for an answer outside the scope of the Order and point out to the witness that under the Order allowing the deposition, you are not required to answer that question.

By Mr. Mann: What is the procedure that would then be followed?

A. My recollection is that you stated that the school would waive the right to District conferences but would protest the proposed action?

Q. Yes, sir.

A. The District Director would forward those recommendations to the National office of the Internal Revenue, to the Assistant Commissioner (Technical). Within that organization, the Exempt Organizations Branch would consider the material forwarded by the District Director and if there was tentative agreement with the District Director's recommendations, the National office would contact the school and offer the school the opportunity of a hearing in the National office as well as the opportunity to submit further briefs to amplify their position.

Q. And if Bob Jones University at that point says, "We don't care for hearing or further briefs", what then?

A. The two options that would follow, assuming that the National office concurred in the District Director's recommendation, is that in the final course a technical information release would be issued announcing the suspension of advance assurance of deductibility of contributions and a technical advice memorandum would be written to the District Director advising him of the conclusion of the National office so that he could base his actions upon this technical advice. Because the two actions would be chronologically identical,

As I understand your hypothetical situation, I don't know if there would be a need for the suspension of advance assurance. It could be that it would be waived because of the imminence of dispositive action by the District Director.

Q. This is a publication by the IRS?

A. Yes, sir.

Q. And it is a publication available to the public as well as the District Directors?

A. Yes, sir.

Q. And it would be made known from a public standpoint to any possible contributors?

A. Yes, sir.

Q. And it would be advised from a technical standpoint that a contribution they made or might make would possibly be questioned from a tax deductibility standpoint?

A. That is correct.

Q. All right, sir. And then at this point, what would happen?

A. The District Director, after having received the technical advice from the National office, would consider the technical advice and unless he objected to the technical advice, he would take action pursuant to it.

Q. And that would amount to a directive from the National office?

A. No, advice is the operative word. The District Director can choose to disagree with the advice and enter into a further dialogue with the National office as to the correctness of the conclusion.

Q. Does he have the right to overrule the National office?

A. I think not but if this is a material point, I would like to check the relevant procedure to determine whether he has the right. As a practical matter, I would think that he would tend to accept the technical advice of the Assistant Commissioner (Technical).

Q. Are you aware of any District Director who has overruled the National office?

A. I am aware of instances in which the District Director —

Mr. Krysa: I object. I think we're beyond the scope of the Order.

By Mr. Mann: Mr. Connett, you have been made aware from discussions of the admissions policy of Bob Jones University, have you not, sir?

A. Yes, sir.

Q. Is there any doubt in your mind under the present rulings as they exist today of the Internal Revenue Service that unless Bob Jones University changes its admissions policy, that its tax exempt status will be revoked?

Mr. Krysa: Objection. The question calls for an answer beyond the scope of the deposition as allowed by the Court's Order and I advise him not to answer.

Mr. Mann: That's what I'm here to ask.

Mr. Krysa: No, you're here to ask as pointed out by the Order, "The plaintiff has stated that it wishes to take the deposition of Mr. Connett with reference to whether or not a decision has been reached on the Washington level as to the revocation of the tax exempt status of the plaintiff."

I believe you put that question to the witness and he answered, "No". It seems to me we have been very lenient and every other question is getting very far afield from what the Court allowed here.

By Mr. Mann: Mr. Connett, if Bob Jones University adopts a racially nondiscriminatory policy of admissions, and assuming that it otherwise qualifies as a charitable or educational institution, under the present rulings of the Internal Revenue Service, would it be allowed to retain its tax exempt status?

Mr. Krysa: I object again for the same reason. It's beyond the scope of the Order, clearly far beyond the scope of the Order, and I point out to the witness that the Order defines what you are to be questioned about and that is outside the scope, that is the question is hypothetical and speculative and calls for a legal conclusion, and as I understand the Court ruling, the Court was allowing interrogation to determine a fact, whether or not something has happened or decision has been made.

Mr. Mann: And you instruct him not to answer?

Mr. Krysa: Yes, sir, I do.

By Mr. Mann: To your knowledge has there been prepared a letter or a copy of a letter to be sent to Bob Jones University at any time with respect to its tax exempt status?

Mr. Krysa: I take it you mean other than the November 30th letter which —

Mr. Mann: Yes, other than the November 30th letter.

By Mr. Mann: None other than the November 30th letter of which I am aware.

Q. The letter that you referred to that would be prepared by the District Director and sent to Bob Jones University, is this a form letter or is it a particularized letter?

A. There is no form letter to notify a school of a proposal to recommend revocation of advance assurance so it would be proposed on an individual case.

I am reasonably sure that because of the volume of work that the District Director has, that they would not have reached this school case.

Q. You do not know of such a letter having been prepared?

A. No, sir.

Q. And you do not know, in other words, that such a letter was not prepared?

A. That's correct.

Mr. Mann: I think that's all I have.

Mr. Krysa: Let me see if I can clear up one thing.

Cross Examination

By Mr. Krysa: My understanding of your direct testimony was that at the time this law suit was filed on September 9th, 1971, there were instructions outstanding to the Director's office to proceed to process the questionnaire?

A. No, that is not correct.

Q. All right. I believe I understood that you testified to that so what was the situation at the time this law suit was filed with respect to that matter?

A. I had notified the District Director's representatives following my conversation with Wesley Walker to proceed to process the response but following instructions from Commissioner Walters as a result of his telephone conversations with Fletcher Mann, I again instructed the District Director's office to withhold action until further advice.

Q. Was that the status of this particular case at the time this law suit was filed?

A. Yes, but that instruction was oral and when the law suit was filed, I felt an obligation to make a written direction to make sure that there could be no possible misunderstanding.

Q. And the written direction told them to —

A. To continue to withhold action.

Mr. Mann: Do you have a copy of that?

The Witness: I think I can get one; I don't know if I can make it available.

Mr. Krysa: I haven't seen it and you haven't been called upon to provide anything yet.

Re-direct Examination

By Mr. Mann: Do you know the date of it?

A. No, sir, I'd have to look.

Q. But it was subsequent to September the 9th?

A. If that was the date —

Q. That suit was instituted?

A. Yes, sir.

Q. It was subsequent to the institution of the suit?

A. Yes, sir, that is the written instruction was subsequent. There were outstanding oral instructions.

Q. I understand your testimony that that was the only letter or memorandum that you had prepared in connection with Bob Jones University?

A. Yes, sir.

Q. It is the only one you have received, no written communications?

A. This is to the District Director.

Q. I realize but you testified you received no written communications or memorandums?

A. I think that —

Q. Or copies of them?

A. I think that the National office responsible for notifying the District Director then gave me a copy to show me they had passed my instructions on to the District Director.

Q. One question and I'll be through.

I want to be sure I understand.

You're not aware of any memorandum that has been prepared by the Internal Revenue Service with respect to Bob Jones University and its tax exempt status?

A. No, I don't recall that that question was asked.

Q. I'll ask it now. Are you aware?

A. Yes.

Q. And who prepared that memorandum?

A. I prepared a memorandum for Commissioner Thrower's signature to advise Commissioner Walters of the posture of the case at the time Commissioner Thrower left office so that Commissioner Walters would understand what discussions had taken place before.

Q. All right now, sir. What was the date of that memorandum?

A. I would have to look, Mr. Mann; I don't know.

Q. And did it not in effect state that Bob Jones University was not going to change its admissions policy and that you should proceed?

A. No, sir, that memorandum said that our discussion with Wesley Walker had indicated that consideration was being given to a change in admissions policy and that if it changed its admissions policy to operate on a racially nondiscriminatory basis and publicized that fact, we would recognize the University as continuing to qualify for exemption because they would then have qualified with the Service's requirements.

Q. And if it did not change its policies, what would you recommend?

A. I don't think that the memorandum reached that point.

Q. Who has a copy of that memorandum, sir?

A. I assume I do.

Q. All right, sir, and you indicate you do not recall the date of it?

A. No, sir, I do not.

Q. Was it prior to the institution of this action, September the 9th?

A. Yes, it would have been written while Commissioner Thrower was still Commissioner of Internal Revenue.

Q. You prepared the memorandum for Commissioner Thrower's signature?

A. Yes, sir.

Q. And was it addressed to Commissioner Walters?

A. No, it was addressed, "To my successor", as I recall.

Q. Your successor?

A. Mr. Commissioner Thrower's successor.

Q. Commissioner Thrower's successor, I see.

Mr. Mann: At this time on the record we would like to orally serve a notice on counsel for the government to produce a copy of that memorandum at the hearing to be held in Greenville before Judge Simons on October the 4th, 1971, which oral notice we will follow with written notice, if necessary.

Mr. Krysa: Counsel notes your notice.

Mr. Mann: I think that will do it. Thank you, sir.

Mr. Krysa: I have no further questions.

(Whereupon, at 2:23 p.m., the taking of the deposition of WILLIAM H. CONNETT was concluded.)

(Signature and Certificate omitted)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Civil Action No. 71-891

BOB JONES UNIVERSITY,
Plaintiff,

-versus-

JOHN B. CONNALLY, Secretary of the Treasury of the United States, and
JOHNNIE M. WALTERS, Commissioner of Internal Revenue,
Defendants.

ORDER

This matter is before the court upon plaintiff's Complaint seeking an injunction *pendente lite*, and upon defendant's Motion to Dismiss plaintiff's Complaint for lack of jurisdiction.

The court received briefs and heard arguments on October 4, 1971, with regard to both the Motions. From the Complaint, affidavits and supporting documents, and the deposition of William H. Connett, Assistant to the Commissioner of Internal Revenue, and from a study of statutory provisions, rules and regulations and authorities involved, the court makes the following Findings of Fact and Conclusions of Law.

Findings Of Fact

1. Bob Jones University is an eleemosynary corporation, organized and granted its certificate of incorporation on November 20, 1952. The University's predecessor was known as Bob Jones College, which was founded near Panama City,

Florida, in 1926. The plaintiff was originally founded and has continued to exist as a fundamentalistic, religious organization which has chosen the field of education, principally at the college level, as the vehicle through which to teach and promulgate its fundamentalistic religious beliefs. The creed of the college as originally founded and the purpose clause of its charter is as follows:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures; combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Savior, Jesus Christ; his identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.¹

2. It further appears from the affidavit of Dr. Bob Jones, III, President of the University, as well as from the affidavits of Dr. Bob Jones, Jr., Chairman of the Board, and Dr. R. K. Johnson, Secretary-Treasurer and Business Manager, that the University's fundamentalistic religious beliefs and practices include the belief and principle that God intended that the various races of men should live separate and apart, and that the inter-marriage of different races is contrary to the will of God, and to the teachings of the Holy Scriptures. In

¹See Page 2 of the affidavit of Dr. Bob Jones, III, and certified copy of certificate of incorporation attached thereto.

keeping with his religious belief and principle, the University has adopted an admissions policy prohibiting the admission of black students to the University.² The plaintiff has also adopted a rule prohibiting its students from dating or marrying members of another race, whether students or not. Violation of this rule results in expulsion from the University. The University believes it would be impossible to enforce that rule if the University were to adopt a racially nondiscriminatory admissions policy (affidavit of Dr. Bob Jones, III). The University requires all students to attend daily chapel services at which the religious views and principles of the University are taught, and all classes and meetings held under the University sponsorship are begun and ended with prayer. All students, with inconsequential exceptions, are required to take courses in religion each semester. All faculty members are required to teach and adhere to the religious beliefs and principles of the school, and any member of the faculty or member of the student body teaching or promoting religious beliefs contrary to those of the University is subject to dismissal. The admissions standards of the University relate not only to academic achievement but also to the religious convictions of a given applicant as well. The University does not now accept, and has not in the past accepted, federal or state grants in aid, nor does it participate in any programs financed by the federal or state governments because the University apparently understands that if it did so it would be required to adopt a racially nondiscriminatory admissions policy which would be contrary to its religious beliefs and practices.

3. The University has apparently enjoyed tax exempt status since its formation, although the records of the University do not go back that far in this regard. The record contains a letter dated March 30, 1951,³ received by the University from the then Deputy Commissioner, advising that it qualified

²One married black part-time student has recently been admitted to the University.

³Copy of letter attached to the affidavit of Dr. R. K. Johnson, Secretary-Treasurer and Business Manager of the University.

as a tax exempt organization, which also referred to a similar ruling of April 30, 1942. The record substantiates that there has been no significant change in the University's practices, principles, or policies since that date.

4. News releases of the Internal Revenue Service issued on July 10 and July 19, 1970, constituted the first threat to the University's tax exempt status. Thereafter the University received a letter of inquiry from the District Director of Internal Revenue requesting information concerning the admissions policies of the University with regard to race. A copy of that letter is attached to the affidavit of Dr. Bob Jones, III. The University's reply was in the form of a letter dated December 30, 1970, which is attached to the affidavit of Mr. William H. Connett. During 1971 various conferences and discussions were held between officials of the Internal Revenue Service, including former Commissioner Randolph W. Thrower, and the present Commissioner, Johnnie M. Walters, and attorneys for the plaintiff. These discussions culminated on or about September 8, 1971, when counsel for the plaintiff concluded that a clear threat existed that the University's status as a tax exempt organization was about to be revoked, and that the advance assurance of deductibility of contributions previously given by the Internal Revenue Service to its contributors was about to be withdrawn.

5. The following day, September 9, 1971, the plaintiff instituted this action, alleging that this threatened action would inflict irreparable harm upon the University, that such threatened action was unlawful in that it exceeded the authority vested in the defendants by Congress, was contrary to the provisions of § 501(c)(3) of the Internal Revenue Code, and would be in violation of the First and Fifth Amendments to the Constitution of the United States. Plaintiff, accordingly, requested temporary and permanent injunctive relief from this court.

6. One of the grounds urged by defendants in support of their Motion to Dismiss is that plaintiff has not exhausted the administrative remedies available to it under Revenue

Procedures 68-17 and 69-3. Mr. Connett's affidavit sets forth the administrative procedures which would be employed were this court not to grant injunctive relief. However, from his affidavit and deposition it appears that there remains very little doubt as to the ultimate loss of plaintiff's tax exempt status. In his deposition Mr. Connett states that plaintiff's tax exempt status would be revoked under the existing law, unless the plaintiff chose to change its admissions policy to comply with the requirements of the IRS and admit black students on a nondiscriminatory basis.⁴ It is thus concluded that any attempt by the plaintiff to follow these administrative procedures would most probably be a useless act, inasmuch as the decision to revoke the tax exempt status of any organization not willing to adopt a racially nondiscriminatory admissions policy apparently has already been made by the Washington Office of the Internal Revenue Service.

A review of the procedures outlined in Mr. Connett's affidavit indicates that by subjecting itself to these procedures the plaintiff would likely suffer irreparable damage. Mr. Connett reveals a sequential process by which, first, advanced

⁴Numerous news releases with a Washington dateline have been noted recently in which it is indicated that many private schools in this and other states have been noticed by the IRS that they will lose their tax exempt status unless they certify that they have adopted a racial non-discriminatory admissions policy.

Furthermore, plaintiff submitted the affidavit of Mr. Joe N. Cocke, who states that the IRS withdrew its prior assurance of deductibility of contributions made to Fayette Academy, and thereafter revoked the Academy's tax exempt status. Attached to his affidavit is a letter dated January 12, 1971, signed by the District Director of the Internal Revenue Service, Atlanta, Georgia. The District Director referred to a previous letter dated December 3, 1970, notifying the Academy of the suspension of advance assurance of deductibility of contributions to that organization pending final determination of its status. The letter goes on in Paragraph 3 to advise the academy of its right to protest and its rights to have conferences at both the District and National Office levels. The fourth paragraph of that letter states: "A conference at either the District or National Office would probably serve no useful purpose if you have no intention of adopting a racially non-discriminatory admissions policy. . . ."

assurance of deductibility of contributions would be withdrawn, and second, the University would be denied tax exempt status and then taxes assessed and collected. Undoubtedly a period of many months would elapse between the time that advanced assurance of deductibility of contributions would be withdrawn and a tax finally assessed and collected, thus requiring redress in the courts pursuant to 26 U.S.C.A. 6213; 28 U.S.C.A. 1346(a)(1), 1491; 26 U.S.C.A. 6532, 7452. It is to be expected that while the Internal Revenue Service is conducting administrative conferences leading to the assessment and collection of a tax, the plaintiff's contributions, upon which it relies heavily, would be curtailed, if not eliminated altogether. Under these circumstances these administrative procedures would serve no useful purpose.

The plaintiff would likely suffer irreparable harm if the threatened action is not enjoined. Plaintiff submitted, in addition to the affidavits previously referred to, the affidavit of another of its counsel, O. Jack Taylor, Jr.; John E. Fowler, C.P.A., employed by the University for the past twenty-five years or more; Jo Ann Hatcher, donations secretary to the University; and affidavits from ten of its contributors. The force and effect of these affidavits is as one might expect: the financial lifeblood of the University to a substantial extent is dependent upon contributions made to it. It appears that cash donations are received daily. During the twenty-day period from September 1 through September 20, 1971, the University received individual cash gifts totaling \$29,695.83. The cash contributions for the year, from August 30, 1970 to August 28, 1971 exceeded \$500,000. Attorney Taylor's affidavit attaches correspondence passing between him and counsel for the Nationwide Foundation in the early part of 1971, to the effect that the Nationwide Foundation, which formerly had made matching grants to the University, would, because of the threatened action, no longer continue their program of matching grants. Affidavits from the ten individual contributors stated that their donations to the University materially depended upon their assurance that the same

would be deductible on their individual income tax returns, and that should the Internal Revenue Service withdraw such assurance of deductibility, their respective contributions would be severely curtailed. The affidavits of the officials of the school substantiate the conclusion that should this financial assistance be curtailed, the University's existence would be jeopardized; and that in an effort to make up for its loss of income received through contributions and to replace the moneys expended in attempting to attain a tax-paying status from a records standpoint (estimated by the accountant Fowler to be between \$80,000 and \$100,000), the University would be forced to revise upward its fees and tuition, with the attendant disruption in the educational programs of its students, and the curtailment of future applications caused by such increases. In addition, the University has a funded indebtedness, as well as an expansion program, which would be placed in jeopardy, and members of its faculty and staff would undoubtedly suffer through the possible loss of current income and retirement programs.

The defendants contend that no irreparable harm would result to the University because of the fact that it could compute and pay its tax and seek refund or otherwise contest the same in either the district court or the tax court. As previously indicated, however, the real harm — the loss of contributions and its attendant consequences — would already have transpired and could not realistically be remedied by this process.

7. The statutory provisions under which plaintiff previously has been granted tax exemption, § 501(c)(3), of the Internal Revenue Code of 1954, provide exemption from taxation for:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit

of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Conclusions Of Law

1. The court has jurisdiction over the parties and the subject matter of this action. 28 U.S.C. 1331, *et seq.*

As previously indicated, the court has concluded that this action is not premature because of a failure, on plaintiff's part, to exhaust available administrative remedies. Further, the court concludes that it is not barred from entertaining jurisdiction of the within action because of defendant's other objections thereto. Defendants contend that plaintiff's action seeks an injunction to avoid the assessment and collection of taxes and is barred by the anti-injunction statute, § 7421 (a), and cannot be the subject of a declaratory judgment proceeding, since 28 U.S.C. 2201 permits such actions except those "with respect to federal taxes"; and, that it is also barred by the principle of sovereign immunity.

Up until now there has been no assessment or even an attempt at assessment of any tax insofar as Bob Jones University is concerned. The defendants admit that assessment procedures would not be commenced until the administrative procedures which they contend are available to the plaintiff have been exhausted; and that no tax would be due if plaintiff's exempt status were revoked as of this date until some time in the calendar year 1972. Technically this suit does not involve an attempt to enjoin the assessment and collection of a tax. Recognizing this, the defendants argue that the word "assessment" includes all acts that are necessarily prerequisite to the actual act of making the assessment, and rely upon *Calkins v. Smietanka*, 240 F. 138 (1917); *Campbell v. Guetersloh*, 287 F. 2d 878 (5 Cir. 1961); *Wahpeton Professional*

Services, P.C. v. Kniskern, 275 F. Supp. 806 (D.C.N.D. 1967); *Koin v. Coyle*, 402 F. 2d 468 (7 Cir. 1968); *Chester v. Ross*, 231 F. Supp. 23 (N.D. Ga. 1964), *aff'd*, 351 F. 2d 949 (5 Cir. 1965); *Cooper Agency, Inc. v. McLeod*, 235 F. Supp. 276 (D.C.S.C. 1964). In each of these cases, an attempt was made to enjoin an action on the part of the Internal Revenue Service directly involved with either the assessment or collection of a tax. In *Calkins* the injunction sought to prevent the production of records during an audit. In *Campbell* the injunction sought to prevent the Service from determining tax due based upon the "bank deposits" method of reconstruction of income. In *Wahpeton*, the action was brought under the declaratory judgment act seeking a declaration as to whether the alleged taxpayer qualified as a corporation and trust for tax purposes. The *Koin* case involved the attempt to assess wagering taxes and involved evidentiary issues thereabout. And in *Chester* there was similarly involved an attempt to suppress the use of evidence because of an injunction procedure where a tax assessment was directly involved.

The court has considered those cases dismissing actions for want of jurisdiction where the question presented involved the tax exempt status of institutions. *Jolles Foundation, Inc., v. Moysey*, 250 F. 2d 166 (2 Cir. 1957); *Kyron Foundation, Inc. v. Dunlap*, 110 F. Supp. 428 (D.D.C. 1952). The court is convinced that the principles enunciated in those cases are not applicable nor controlling here. The plaintiff does not ask this court to substitute its judgement for that of a federal officer acting in his official capacity. The gravamen of plaintiff's Complaint is that the defendants are threatening to act outside of their authority to exercise judgement and discretion which are not within the legal limits of their authority in such circumstances, since they are purporting to act beyond the authority granted by the constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress.

If the question here were the applicability of the threatened action to the plaintiff rather than the validity of the action itself, the court would most probably be persuaded to take a different view. If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the applicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal officer which it would be powerless to do. However, the plaintiff readily concedes that it practices a racial discriminatory admissions policy, placing it squarely in violation of the avowed policy of defendants. Thus, this is not a case where the defendants or the court must decide the question of whether the University has a racially nondiscriminatory admissions policy. Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.

Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm of plaintiff, the 4,500 students who attend the plaintiff University, some 650 faculty and staff members, and of the public which is served by the existence of the University.

The Supreme Court has decided many cases in which it has stated the obvious purpose for which the anti-injunction statute was enacted. In *Enochs v. Williams Packing Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 292, the Court said:

The manifest purpose of Section 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner, the United States is assured of prompt collection of its lawful revenue.

The courts have consistently applied this statute in those cases which do not come within the exception thereto, and have refused to entertain jurisdiction of suits seeking injunctions against the levy, assessment, and collection of federal taxes. Many years after the adoption of the original anti-injunction statute, Congress enacted the declaratory judgment act which taxpayers were quick to utilize to avoid the effects of the anti-injunction act. Congress rightfully put an end to such suits by amending the declaratory judgment act by inserting the phrases "except with respect to federal taxes," which removed the jurisdiction of federal courts to hear declaratory judgement proceedings with respect to the levying, assessment and collection of federal taxes.

Jurisdiction of suits of the nature of this case has been exercised by the courts for many years. For instance, see *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453 (1922) and cases cited therein. In *Hill*, plaintiff sought to enjoin the Commissioner of Internal Revenue from imposing a tax on contracts for the sale of grain for future delivery. The Commissioner moved, as he does in the matter before this court, to dismiss the suit, contending that the action was an attempt to enjoin the collection of a tax, contrary to a predecessor of § 7421(a) of the current Internal Revenue Code. The Supreme Court held that such was not the nature of the action brought by the plaintiffs in *Hill*. In doing so, the Court said:

It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of Boards of Trade through supervision of the Secretary of

Agriculture and the use of an administrative tribunal. . . . The manifest purpose of the tax is to compel Boards of Trade to comply with regulations, many of which can have no relevance to the collection of a tax at all. . . . The act is in essence and on its face a complete regulation of Boards of Trade, with a penalty of 20 cents a bushel on all "futures" to coerce Boards of Trade and their members into compliance.

Likewise the record in this case supports the conclusion that the primary purpose of acquiring Bob Jones University to adopt a racial nondiscriminatory admissions policy is not to levy, assess, and collect a tax from the plaintiff, but is being done solely for the purpose of complying with a recently espoused policy of the Internal Revenue Service to require certain private educational and religious institutions to adopt and administer racially nondiscriminatory admissions policies and practices. It is obvious that if the plaintiff will agree to the demands of the defendants and change its admissions policy so as to admit blacks on a nondiscriminatory basis, the tax exempt status held by the plaintiff with the express approval of the defendants for a period in excess of forty years will continue in full force and effect.

The conclusion is inescapable that the primary purpose of the defendants in threatening the revocation of the plaintiff's tax exempt status is not to assess and collect taxes, but to compel, through the use or threat to use, taxing powers to require private educational and religious institutions to comply with certain political or social guidelines with regard to the question of racial integration. As such, the plaintiff's action should not be barred by 26 U.S.C. 7421(a), or 21 U.S.C. 2201. In finding that this case is barred neither by the anti-injunction statute nor provisions of the Declaratory Judgment Act, the court is mindful of the decision in *DeMasters v. Arend*, 313 F. 2d 79 (9 Cir. 1963). In *DeMasters*, the taxpayer sought to restrain the Internal Revenue Service from investigating the possible income tax liability for years

barred by the statute of limitations in the absence of fraud. There the court said:

. . . If appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the Doctrine of Sovereign Immunity.

In a footnote the Court stated:

We are also satisfied that this taxpayer's suit is neither one for declaratory judgment "with respect to federal taxes" precluded by 28 U.S.C.A. 2201; nor an action "for the purpose of restraining the assessment or collection of any tax" precluded by 26 U.S.C.A. 7421(a).

The court also concludes that this action is not barred by the Doctrine of Sovereign Immunity. It has long been recognized that the sovereign cannot act illegally or unconstitutionally and, therefore, if an act or threatened action is unconstitutional or illegal it is not the action of the sovereign and such acts or threatened acts can be enjoined. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *United States v. Lee*, 106 U.S. 196 (1882); *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 409 F. 2d 718 (2 Cir. 1969). Since the primary thrust of plaintiff's action is that it is seeking to enjoin a threatened illegal and unconstitutional act, it is concluded that the court is not deprived of jurisdiction because of the Doctrine of Sovereign Immunity.

Based on the foregoing the court concludes that defendants' Motion to Dismiss should be denied.

2. Plaintiff's Motion for an injunction *pendente lite* should be granted.

Based on the present record, the court finds that plaintiff has made a *prima facie* showing that the defendants have surpassed, or are in the process of exceeding, their statutory

authority as granted to them by the Congress in the Internal Revenue Laws.

In this connection, the court is not unaware of the three-judge district court decision in *Green v. Kennedy, et al.*, 309 F. Supp. 1127 (1970). It is concluded that the *Green* case is distinguishable both on its facts and in the legal issues presented therein. In the first place, the plaintiff school here has practiced the admissions policy now in issue for over forty years, whereas, in the *Green* case, the private schools whose tax exempt status was being challenged were only recently established "as an alternative for white students seeking to avoid desegregated public schools." Then, too, the present plaintiff contends, and has introduced substantial evidence in support of such proposition, that its admission policy is, and always has been, based on religious considerations.⁵ The *Green* court was not confronted with such a substantial conflict between constitutional rights — that is, the right of religious organization to practice its teachings without being treated any differently than any other religious group by the United States government versus the right not to be discriminated against on the basis of race — when it reached its decision. In point of fact, the *Green* court not only was not faced with this issue, but also was without the benefit of the reasoning and holding contained in the more recent case of *Walz v. Tax Commission*, 397 U.S. 664, 25 L.Ed. 2d 697, 90 S.Ct. 1409 (1970); the case plaintiff relies upon so heavily in support of its interpretation of the aforesaid constitutional right it advances. In the *Walz* case the Supreme Court held that "for the government to exercise at the very least this kind of benevolent neutrality, [tax exemption,] toward churches and religious exercises generally so long as none was favored over others and none suffered interference" was not a violation of the religious clauses of the First Amendment. In this context, and for the sole purpose of considering this request for temporary relief, this court concludes that the rationale and the holding of the *Green* case are not controlling herein.

⁵This is but one of several constitutional rights that plaintiff contends will be violated if its tax exempt status is revoked.

Another reason why the court is disposed to grant plaintiff's Motion is that upon balancing the equities and weighing relative hardships that would be incurred by the respective parties if the relief asked for is granted or denied, it concludes that the equities lie in favor of granting the temporary injunction. In the event temporary injunctive relief is denied to the plaintiff, and should it prevail after a trial on the merits it could not, in all likelihood, recover the loss of contributions which it probably would experience because of the threat of loss of its tax-exempt status. On the other hand, should the defendants prevail in the trial they would not have incurred any substantial monetary expense, loss, or other irreparable harm, since any taxes that plaintiff might then be required to pay would not be due and owing until April 15, 1972, a date long after a decision on the merits should have been reached; and they would have been enjoined from revoking plaintiff's tax-exempt status only for a short period of time. Moreover, as the court previously observed, the revocation of plaintiff's tax-exempt status is not being attempted for the purpose of raising additional tax revenues, but for the purpose of compelling plaintiff to adopt a non-discriminatory admission policy. Whether or not the defendants will ultimately achieve this goal is not a question for this court to answer, but in view of the aforesaid substantial clash of constitutional guaranties involved in this controversy this court does believe, and accordingly decides, that if in fact the outcome of this litigation will have any effect on the attainment of this goal such a result should come only after a trial on the merits has been had. It is, therefore,

Ordered that the defendants' Motion to Dismiss be, and it hereby is denied; and, it is further

Ordered that the defendants, their agents, servants, deputies, employees, successors in office and all persons in active concert with them, are hereby enjoined *pendente lite* from revoking or threatening to revoke the tax exempt status of plaintiff, and further enjoined *pendente lite* from withdrawing advanced assurance deductibility of contributions solely be-

cause of the admissions policy of plaintiff pending a final hearing and determination of this cause on the merits.

CHARLES E. SIMONS, JR.
United States District Judge

Columbia, S. C.
November 17, 1971.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL ACTION NO. 71-891

ANSWER

John B. Connally, Secretary of the Treasury of the United States and Johnnie M. Walters, Commissioner of Internal Revenue, defendants in the above action, by their attorney, in answer to the Complaint filed herein admits, denies and alleges as follows:

I

Admits.

II

Denies.

III

Admits.

IV

Denies except admits that the defendants' predecessors had issued a ruling recognizing the plaintiff as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954.

V

Defendants lack knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph V.

VI

Denies except admits that the plaintiff has adopted an admissions policy which excluded the admission of members of the Negro race.

VII

Denies except admits that the defendants published its policy relative to the tax exempt status of private schools, including religious schools, which are contained in news releases dated July 10, 1970 and July 19, 1970 and alleges that said news releases which are a part of the record here speak for themselves.

VIII

Denies and alleges that the letter of November 30, 1970 referred to in paragraph VIII speaks for itself.

IX

Denies except alleges that it has no knowledge or information sufficient to form a belief as to the truth of paragraph 9(b).

X

Denies.

XI

Denies.

XII

Denies.

XIII

Denies.

XIV

Denies.

XV

Denies.

XVI

Denies.

Wherefore, the defendants having answered, prays that the Complaint be dismissed with prejudice.

(Signature and Certificate of Service omitted)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

NOTICE OF APPEAL

C/A No. 71-891

Notice is hereby given that John B. Connally, Secretary of the Treasury of the United States and Johnnie M. Walters, Commissioner of Internal Revenue, defendants above named, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Order of the United States District Court, District of South Carolina, Greenville Division, which was entered on November 17, 1971.

JOHN K. GRISSO
United States Attorney
JAMES D. McCOY, III
Assistant U.S. Attorney
Attorneys for Appellants

Greenville, South Carolina
January 14, 1972.

UNITED STATES COURT OF APPEALS
For The Fourth Circuit
No. 72-1075

BOB JONES UNIVERSITY, *Appellee*,

v.

JOHN B. CONNALLY, Secretary of the
Treasury of the United States and
JOHNNIE M. WALTERS, Commissioner of
Internal Revenue, *Appellant*.

Appeal from the United States District Court for the
District of South Carolina, at Greenville.
Charles E. Simons, Jr., District Judge.

(Argued October 4, 1972 Decided January 19, 1973)

Before BOREMAN, WINTER and BUTZNER, Circuit Judges.

Leonard J. Henzke, Jr., *Attorney, Department of Justice*,
(John K. Grisso, *United States Attorney*, Scott P. Crampton,
Assistant Attorney General, Meyer Rothwacks, Grant W.
Wiprud, *Attorneys, Department of Justice*, Tax Division, on
brief) for Appellants; J. D. Todd, Jr., (Wesley M. Walker,
James H. Watson, O. Jack Taylor, Jr., and Leatherwood,
Walker, Todd and Mann on brief) of Appellee.

WINTER, Circuit Judge:

Bob Jones University (Jones University), a non-profit educational institution which concededly practices racial discrimination in the admission of students, sought a preliminary and permanent injunction to prevent Treasury officials from terminating its tax-exempt status. Treasury officials had begun administrative proceedings to that end in accordance with an announced policy of withdrawing tax-exemption and deductibility-assurance rulings of schools having racially discriminatory policies, when suit was filed. The district court denied the Treasury officials' motion to dismiss for lack of jurisdiction and granted an injunction *pendente lite*. Because we conclude that the district court lacked jurisdiction under

§ 7421 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421 to grant the requested relief, we reverse and remand the case for dismissal of the complaint.

I

Jones University is a fundamentalist religious organization which subscribes to the belief that God intended the various races of men to live separate and apart, and that intermarriage of different races is contrary to God's will and the teaching of the Scriptures. In furtherance of these beliefs, Jones University prohibits the admission of black students, it prohibits students it does admit from dating or marrying members of another race, whether students or not, and it accepts some Oriental students but only on condition that they will not date outside of their own race. Jones University has enjoyed tax-exempt status since at least April 30, 1942, under § 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 501(c)(3) and the predecessor code.

On July 10 and July 19, 1970, the Internal Revenue Service (IRS) announced publicly that it could no longer legally justify allowing tax-exempt status to private schools which have racially discriminatory admission policies, nor could it treat gifts to such schools as tax-deductible charitable contributions. It also stated that, although the non-discrimination requirement would not affect a school's ordinary admissions policies which had no relation to race, the requirement would prohibit allowance of the tax benefits to church-related schools which discriminated on the basis of race. On November 30, 1970, IRS wrote a letter of inquiry to each school in the United States, including Jones University, announcing its new policy and requesting each school to furnish specific information regarding its admissions policy within thirty days. Jones University responded that it did not admit blacks.

There followed various communications and meetings between IRS and representatives of Jones University, each refusing to deviate from its original position. The suit was filed on September 9, 1971, and no further administrative

steps were taken. Had suit not been filed there would have been further conferences at the level of the District Director and the National Office in Washington. Only if Jones University declined to abandon its racially discriminatory policies and IRS declined to alter its announced policy would Jones University's tax-exempt status be revoked, its records audited and a notice of proposed tax deficiencies issued. Even then, Jones University would have additional opportunities to seek administrative relief. See 9 Mertens Law of Federal Income Taxation (Rev.) §§ 49.110, 49.112, 49.114, 49.115, 49.118-49.124. If administrative relief was not forthcoming, IRS would issue a notice of deficiency, the legality and correctness of which could be litigated in the Tax Court, 26 U.S.C.A. § 6213, or, alternatively, Jones University could pay the tax and sue for a refund on the ground of illegality, 28 U.S.C.A. § 1346; 26 U.S.C.A. § 7422.

II

The controlling statute reads;

§ 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions in the statute are inapplicable: §§ 6212(a) and (c) and 6213(a) permit suits in the Tax Court to litigate the legality and correctness or deficiency assessments and § 7426(a) and (b) (1) relates to foreclosure proceedings and judicial sales with regard to property on which the United States has a tax lien and permits the United States to be joined and participate in cases of this nature.

Jones University contends, and the district court concluded, that the statute is inapplicable because no formal as-

assessment of deficiencies had been made and thus the suit did not seek to enjoin an "assessment or collection" of any tax. We disagree. First, the administrative proceedings which had as their object the withdrawal of tax-exemption and deductibility-assurance rulings are directly involved with the assessment and collection of taxes from Jones University and those making contributions thereto. If those rulings are withdrawn, Jones University will be liable for taxes on any net income which it realizes and contributors to Jones University may not deduct from their gross income the amounts of their contributions. Either event would result in an increase in taxes.

A number of cases hold, or make clear, that a suit to enjoin the withdrawal of tax-exemption rulings, the withdrawal of which would ultimately result in potentially greater tax revenues, constitutes a suit to enjoin the "assessment" of a tax within the meaning of § 7421, and we are persuaded to follow them. *J. C. Penney Co. v. United States Treasury Dept.*, 439 F.2d 63 (1971), aff'g 319 F.S. 1023 (S.D. N.Y. 1970), cert. den. 404 U.S. 869 (1971), *Koin v. Coyle*, 402 F. 2d 468 (7 Cir. 1968); *Kennedy v. Coyle*, 352 F.2d 867 (7 Cir. 1965); *Zamaroni v. Philpott*, 346 F.2d 365 (7 Cir 1965); *Crenshaw County Private School Foundation v. Connally*, — F.S. — (M.D. Ala 1972) (on motion to dismiss); *Horton v. Humphrey*, 146 F.S. 819, 821 (D. D.C.), aff'd 352 U.S. 921 (1956) (per curiam). The common sense of the matter is that where, as we have shown, the necessary result of granting the relief prayed would be to prevent the assessment of any tax, § 7421 is applicable.

The circumstances under which § 7421 is not to be applied, when it would otherwise appear to be applicable, are spelled out in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962). The test to permit a taxpayer successfully to enjoin the assessment or collection of a tax is twofold: first, he must show irreparable injury to himself if collection were effected, and second, he must show that "under no circumstances could the Government ultimately prevail" in its assertion of tax liability. 370 U.S. at 7. Otherwise, his remedy is to litigate the

validity or amount of the tax by the statutory routes, i.e., appeal of assessment, or payment of the tax and suit for refund.

We have no doubt that Jones University will suffer irreparable injury if withdrawal of its tax-exempt status is effected even if it should ultimately prevail in its argument that its tax-exempt status may not legally be disturbed. Of course, the tax on any net income which may be imposed would be recoverable, but we would be naive indeed not to recognize the substantial portion that contributions play in the gross income of any institution of higher learning and the adverse effect on those contributions if their deductibility for income and estate tax purposes of the donors is disallowed. If Jones University is required to litigate its tax-exempt status after that status has been withdrawn, we can predict with confidence that during the period of litigation it will lose gifts and contributions which will never be recoverable even if it is successful in having its tax-exempt status restored. Thus, the first test of *Williams Packing*, irreparable injury, is met, and we consider the second.

We cannot conclude that "under no circumstances" could IRS be successful in withdrawing Jones University's favorable tax rulings. Although we decline the invitation of counsel for Jones University, extended in oral argument, to decide this case finally on the question of whether Jones University is entitled to tax-exempt status, and consequently we are not to be understood as expressing any view on the ultimate merits of the dispute between IRS and the taxpayer, the recent decision in *Green v. Connally*, 330 F.S. 1150 (D. D.C. 1971), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971) makes apparent our conclusion. *Green* was a class action by Negro parents of school children attending public schools in Mississippi to enjoin U.S. Treasury officials from according tax-exempt status and deductibility of contributions to private schools in that state which discriminated against Negro students. The relief prayed was granted and on appeal the Supreme Court affirmed *per curiam*.

The essence of the decision of the D. C. district court may be distilled as follows: Section 501(c) (3) of the Internal Revenue Code, in granting tax-exempt status to "religious" and "educational" institutions requires that they also satisfy the common law concept of "charitable." At common law a charitable trust cannot be created for a purpose which is illegal or whose accomplishment would tend to frustrate some well-settled public policy. Hence there is presently serious doubt, in view of shifting racial attitudes as reflected in legislation and court decisions, that a charitable trust can legally be established, or an existing trust enforced, which establishes racially discriminatory educational institutions. Federal tax exemptions and deductions are generally not available for activities contrary to declared federal public policy. In the light of the Fourteenth Amendment, the decisions of the Supreme Court on the subject of school desegregation and the Civil Rights Act of 1964, the exemptions and deductions provided for charitable educational institutions are not available for private schools discriminating on grounds of race.

Because of the breadth of these holdings and their acceptance by the Supreme Court, we cannot conclude that IRS's contemplated withdrawal of tax-exemption and deductibility-assurance rulings is frivolous or that IRS "under no circumstances" may ultimately prevail. It follows that the second requirement of *Williams Packing* has not been met and § 7421 is a complete bar to maintaining the action.

A final comment is necessary. While the district court found, and the dissenting member of the panel stresses, that the "primary purpose" of the Treasury officials in threatening to revoke Jones University's favorable tax status was not to assess and collect taxes but to exact compliance with certain political or social guidelines, i.e., discontinuance of racial discrimination, we think that the finding is irrelevant to the proper disposition of this case. Substantially the same argument was made and rejected in *Bailey v. George*, 259 U.S. 16 (1922). There the Court prohibited enjoining a collector

of internal revenue from collecting the Child Labor Tax despite the argument that the tax was not for the purpose of raising revenue, but for the purpose of regulating child labor. In the *Bailey* case there was even more reason to accept the argument than in the case at bar because on the same day that Mr. Chief Justice Taft wrote that an injunction against the collection of the tax would be improper, the Court ruled, again in an opinion by Mr. Chief Justice Taft, that the Child Labor Tax was unconstitutional. *Child Labor Tax Case*, 259 U. S. 20 (1922). Hence, we deem rejection of the argument in *Bailey* as conclusive here.

Similarly, in *Singleton v. Mathis*, 284 F.2d 616 (8 Cir. 1960), the Court affirmed the denial of an injunction against the director of internal revenue who was proceeding to collect a gaming tax of \$250 on each of two pinball machines. It appears to be obvious that the purpose of the tax was not to raise revenue, but was to control gambling because a \$10 tax was the amount assessed against amusement devices by the same statute.

Accordingly, we reverse the judgment of the district court and remand the case for dismissal of the complaint.

REVERSED AND REMANDED.

BOREMAN, Senior Circuit Judge, dissenting:

For the reasons cogently stated by the district court in *Bob Jones University v. Connally*, 341 F. Supp. 277 (D. S.C. 1971), I respectfully dissent. I would add the following comments and observations.

Under § 7421 of the Internal Revenue Code, as interpreted in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), the burden upon one seeking to enjoin the collection of a tax is huge, indeed. A showing of irreparable harm, "such as the ruination of the taxpayer's enterprise," says the Court, 370 U.S. at 6, is *not* enough. It must be shown that "under no circumstances could the Government ultimately prevail." 370 U.S. at 7. It would appear obvious that, as a practical

matter, such a standard could possibly be met only in the most exceptional and unusual circumstances.¹

The reason for this exceptional administrative power has been found in the "manifest purpose" of § 7421, *i.e.*, that the United States must be "assured of prompt collection of its lawful revenue." *Williams Packing Co.*, *supra*, 370 U.S. at 7. However, the United States is not primarily concerned here with the collection of revenue. The district court expressly found that the "primary purpose" of the Treasury officials in threatening to revoke the University's tax exempt status and tax deductible benefits to donors is *not* to assess and collect taxes, but through the use of taxing powers "to require private educational and religious institutions to comply with certain political or social guidelines." 341 F. Supp. at 284.

The University contends, *inter alia*, that the threatened actions of the Treasury officials would violate the First Amendment in that such actions would (1) deprive the University of the free exercise of its religious beliefs and, (2) promote, benefit and establish other religions. It certainly is not to be assumed that the Commissioner is possessed of "administrative expertise" with respect to the question presented, or that his legal opinion is in any way entitled to exceptional weight. Indeed, it would appear to me that the threatened acts of the defendants may well be subject to serious challenge as arbitrary and capricious and beyond the scope of their statutory power and authority.²

The majority decision would permit the Government to irreparably damage the University by actions taken upon a legal determination by the Commissioner not directly related to any "tax law," for a purpose not directly related to the

¹For instance, it is unlikely that this court would assume to state positively, in advance, what the Supreme Court would hold under *any* given set of circumstances. To do so would be presumptuous, indeed.

²The district court found that the University "has made a *prima facie* showing that the defendants have surpassed, or are in the process of exceeding, their statutory authority as granted to them by the Congress in the Internal Revenue Laws." 341 F. Supp. at 285.

collection of any tax, upon the merest chance that the Commissioner might be right. On the facts of this case, I can find no reason, purpose or justification for permitting the Government, absent proper judicial scrutiny going substantially beyond the "under no circumstances" test of *Williams Packing Co.*, to so proceed against the University. Surely such was not the intent of Congress in enacting § 7421, nor the meaning of the Supreme Court in *Williams Packing Co.*

Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionally mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University. To permit such threatened action in these circumstances without affording the University a right to judicial consideration would tend to demonstrate that the age old phrase — "*The power to tax is the power to destroy*" — is literally true.

No case is cited by the Government which applies the strict *Williams Packing Co.* tests in circumstances similar to those in the instant case. I reach the conclusion that the application of that test here may well present a question as to the constitutionality of § 7421.

IN THE
UNITED STATES COURT OF APPEALS
for the Fourth Circuit
No. 72-1075

PETITION FOR REHEARING IN BANC

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Appellee, Bob Jones University, respectfully petitions this honorable court for a rehearing of the Appeal in the above entitled cause, and in support of this Petition represents to the Court as follows:

I

The Appellee respectfully submits that this Court overlooked or misapprehended the necessity for the application of the Anti-injunction Statute, 26 U.S.C.A. 7421 and the rule of *Enochs v. Williams Packing Co.*, 370 U.S. 1, 82 S. Ct. 1125 (1962), the lower court having found that this case is indeed not one seeking a restraint of an assessment or seeking to restrain any collection procedures. The record in this case is clear, unequivocal and uncontradicted that the so-called tax would never be assessed or collected should the University abandon its recognized religious beliefs and change its admissions policy. The reason for the rule of the *Williams Packing* case, namely, that the Government must be assured of prompt collection of its lawful revenue, has no application to the facts of this case since it is crystal clear that if the University would just abandon its religious beliefs and change its admissions policy, no tax would be assessed and no change in its tax exempt status would be made.

Furthermore, the Court in *Williams Packing* recognized that in a situation such as is present here ". . . the exaction is merely in 'the guise of a tax.'" citing *Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. at 509, 52 S.Ct. at 263, the reason for the Anti-injunction Statute is lacking and thus, it is not applicable. Thus, the precise point the Uni-

versity makes here was recognized by the Supreme Court in the case relied upon in the majority opinion.

The facts of this case are far more closely related to those in *Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. 498 52 S.Ct. 260, than to the *Williams Packing* case, and in the *Nut Margarine* case, injunction was held properly granted. In *Nut Margarine* the Court stated:

And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. 248 U.S. p. 509.

Although admittedly this rule was restricted somewhat in *Williams Packing*, *Williams Packing* does not permit the result reached in the majority opinion of this case, which would completely deprive a litigant of the protection of the courts, no matter what the equities and no matter what irreparable harm might result.

Although the relief prayed for could ultimately result in the prevention of assessment and collection of a tax, clearly the government action is aimed, not at collection of revenues, but directed to forcing a change in religious beliefs and practices. In no case cited by the Government or relied upon by the majority opinion was irreparable harm together with fundamental constitutional rights asserted. In *J. C. Penney Co. v. U.S. Treasury Department*, 439 F.2d 63 (1971), injunctive relief was sought to prevent an investigation under the Anti-dumping Act. No constitutional issue was raised, no irreparable harm found, an adequate remedy found available, and no discussion of *Williams Packing* was made in *Penney*.

In *Koin v. Coyle*, 402 F.2d 468 (7th Cir. 1968), the Court found an adequate remedy at law. Similarly, in *Kennedy v. Coyle*, 352 F.2d 867, (7th Cir. 1965), the taxpayer was found to have "... a plain, adequate and complete remedy at law."

Zamaroni v. Philpott, 346 F. 2d 365 (7th Cir. 1965) involved the use of allegedly illegally seized evidence to which taxpayer could later object. *Horton v. Humphrey*, 146 F. Supp. 816 (D.D.C.) aff'd 352 U.S. 921 (1956) (per curiam), involved the Antidumping Act where an adequate remedy was found available in the Customs Court. The far-reaching freedom of religion issue presented by the University here, was not available in *Crenshaw County Private School Foundation v. Connally*, F. Supp. (M.D. Ala. 1972).

Thus, in no case has the Anti-injunction Statute been used to prevent judicial redress of a flagrant and obvious attempt to tax religious belief and practice where admittedly irreparable harm will result. The oft-quoted phrase of Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431, "The power to tax involves the power to destroy" is most applicable here, particularly because the University's most precious constitutional rights are in the process of destruction by taxation.

II

The Appellee respectfully submits that this Court has overlooked, misapprehended or incorrectly applied the decision of the United States Supreme Court in *Enochs v. Williams Packing Co.*, *supra*. The majority opinion of this Court acknowledges that the University will suffer by even a temporary change in its tax-exempt status, irreparable harm. The opinion states on Page 8, "We have no doubt that Jones University will suffer irreparable injury if withdrawal of its tax-exempt status is effected even if it should ultimately prevail in its argument that its tax-exempt status may not legally be disturbed." The Court then held that it could not be concluded that under no circumstances could the Government be successful in withdrawing the University's favorable tax rulings. The District Court held that the University has made a prima facie showing of the unconstitutionality of the Government's threatened action, and it is respectfully submitted that such prima facie showing is sufficient to satisfy the

second test of *Williams Packing*. The application of the second test, as made in this decision, will effectively deprive any litigant from successfully seeking an injunction since, as pointed out in Judge Boreman's dissenting opinion, it would be presumptuous indeed for any District Court or Court of Appeals to state positively in advance what the Supreme Court would hold under any given set of circumstances.

III

The Appellee respectfully submits that this Court misapplied or misapprehended the Anti-injunction Statute, 26 U.S.C.A. 7421, in that the application of such statute under the facts of this case would be violative of the Constitution of the United States and it would deny the University due process of law. As found by the District Court and as conceded by the majority opinion in this Court, the procedure sought to be followed by the Government would result in irreparable harm to the University, without any recourse to judicial review prior to its imposition, and despite the fact that there is no statutory authority for the action of the collector in attempting to revoke the tax exempt status of the University on the grounds which he attempts to use. Of paramount significance in this case is the fact that such irreparable harm is inflicted as a result of the University's exercise of a fundamental constitutional right, the right to freely exercise its religious beliefs without punitive Government action. To deny the University, upon penalty of losing its tax exempt status, the most precious freedoms guaranteed by the Constitution, without a chance to be heard and without any judicial scrutiny is a startling example of the denial of due process.

The application of 26 U.S.C.A. 7421 to the facts of this case would vest enormous and unrestrained power in the executive under our constitutional system of checks and balances. As stated so cogently in the dissenting opinion of the Senior Circuit Judge of this Court, "Indeed, it would appear to me that the threatened acts of the defendants may

well be subject to serious challenge as arbitrary and capricious and beyond the scope of their statutory power and authority." As further stated by Judge Boreman, "Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionality mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University. To permit such threatened action in these circumstances without affording the University a right to judicial consideration would tend to demonstrate that the age-old phrase — '*The power to tax is the power to destroy*' — is literally true."

It is well settled that due process requirements are applicable to the taxing powers of the Federal Government. *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358. In a long series of cases, the Supreme Court has continuously recognized and reaffirmed that the constitutional right of procedural due process requires a hearing. " '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (Frankfurter, J., concurring)." *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, (1971). Furthermore, it is well settled that the due process right to a hearing must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965). The hearing required must be before an impartial tribunal. *Ward v. Village of Monroeville, Ohio*, 93 S.Ct. 80 (1972). The recent Supreme Court decision in *Ward* is particularly significant here. There the Court held that due process was denied where the Mayor of Monroeville who had general responsibility for the financial affairs of his Village sat as Judge in the Mayor's Court which produced a substantial amount of the revenues used by the City from fines collected. Certainly, to subject the University, without judicial scrutiny, to administrative proceedings before the

Commissioner of Internal Revenue charged by law with the collection of revenues would place it before the most partial tribunal. In such a situation the position of the Commissioner is much like that of the Mayor of Monroeville. The University's position would be all the more constitutionally objectionable because the Commissioner would be called upon to decide constitutional questions out of his field of expertise and arguments which he has apparently rejected.

The dismissal of the University's suit would leave it at the mercy of the Internal Revenue Service which has promulgated the ruling offensive to the University and actively sought to impose its will upon the University. In this case the Government seeks to be judge, jury and executioner. The University respectfully submits that to subject it to the unfettered power of the Internal Revenue Service without judicial supervision constitutes a patent and gross denial of constitutionally mandated due process.

IV

The Appellee respectfully submits that this Court misapplied or misapprehended the rulings of the Supreme Court in *Bailey v. George*, 259 U.S. 16 (1922) and the *Child Labor Tax* case, 259 U.S. 20 (1922), in that in those cases there was no finding of irreparable harm. There a suit for refund would restore the status quo and there no First Amendment rights were involved. The refund suit available in *Bailey* was all the more adequate in view of the Court's decision in the *Child Labor Tax* case. With the taxing statute declared unconstitutional, one would certainly expect ready redress in a refund suit.

Here the University can never recover its loss of contributions should the Government be unrestrained. As recognized by the majority opinion, this loss, for which there is no remedy, would affect contributions which constitute a substantial portion of the income of Bob Jones University.

V

The Appellee respectfully submits that in attempting to apply the rule of *Williams Packing*, the Court overlooked or misapprehended the established fact that the Commissioner of Internal Revenue has granted a tax exempt status to Appellee since at least 1942 and that there has been no change in either the admissions policy of Bob Jones University or § 501(c)(3) of the Internal Revenue Code. *Miller v. Standard Nut Margarine Company*, 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422.

VI

The Appellee respectfully submits that this court misapplied or misapprehended the decision of the United States Supreme Court in *Williams Packing, supra*, by failing to reach the merits of this case and thus failing to decide that "Under no circumstances could the Government ultimately prevail." The University has raised significant and far-reaching statutory and constitutional issues as recognized by the District Court and the Senior Circuit Judge of this court. To decide the second test of *Williams Packing* without thorough consideration of these issues is inappropriate here. The reliance by the court upon the decision of *Green v. Connally*, 330 F. Supp. 1150 (D.D. C. 1971), *aff'd per curiam sub nom. and Coit v. Green*, 440 U.S. 997 (1971), is misplaced. The issues raised by the University here were not involved in *Green*, and the *Green* court specifically refused to consider the ramifications of the injection of First Amendment rights into that case. In connection with First Amendment rights, the *Green* court recognized that religious freedoms may be involved.

The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of religious purpose. . . . We are not called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a

religious school that practices acts of racial restriction because of the requirements of the religion. 330 F. Supp. p. 1169.

The University respectfully submits that the application of the *Green* decision in the context of *Williams Packing* where the *Green* court itself specifically refused to decide the question asserted by the University is misplaced. The University has cited numerous cases supporting its constitutional rights, which are far more applicable to the present controversy than *Green*. *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332; *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545, 78 S. Ct. 1350; *Scherbert v. Verner*, 375 U.S. 398, 83 S. Ct. 1790.

VII

The Appellee respectfully submits that this court misapplied or misapprehended the inherent jurisdiction of federal courts to grant relief in cases of this nature. As stated in *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 409 F.2d 718 (1969), "The power to declare an action of the legislative or executive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action. Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person withstanding to assert it."

The Supreme Court has approved of the exercising of this inherent jurisdiction to enjoin the collection of a tax by federal taxing authorities. In a situation similar to that found here, the Court in *Hill v. Wallace*, 359 U.S. 44, 42 S.Ct. 453, found that a so-called tax was for the purpose of compelling boards of trade to comply with regulations many of which had no relevancy to the collection of the tax. Here, the University fails to see any relationship between its religious beliefs and admissions policy and the collection of a tax.

VIII

The Appellee respectfully suggests that this case be reheard in banc in that this case involves questions of exceptional importance. Far-reaching and fundamental constitutional questions are presented which affect in a most serious and irreparable manner the Appellee University, the 4,500 students attending it, the 650 members of its faculty and staff as well as thousands of its contributors and financial supporters. The University submits that the statement of Mr. Justice Oliver Wendell Holmes — "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. State of Mississippi*, 277 U.S. 218, 223, 48 S.Ct. 451, 453, remains the law of the land.

For the foregoing reasons this Petition should be granted.

(Signature and Certificates omitted)

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 72-1075

Bob Jones University, *Appellee*,

v.

John B. Connally, Secretary of the
Treasury of the United States and
Johnnie M. Walters, Commissioner of
Internal Revenue, *Appellant*.

Appeal from the United States District Court for the
District of South Carolina, at Greenville.

Charles E. Simons, Jr., District Judge.

Submitted February 5, 1973 Decided March 21, 1973

Before BOREMAN, Senior Circuit Judge, and WINTER and
BUTZNER, Circuit Judges.

ORDER ON PETITION FOR REHEARING

PER CURIAM:

Bob Jones University (Jones University) petitions for rehearing and suggests rehearing in banc on the ground, *inter alia*, that our decision is in conflict with the decision of the District of Columbia Circuit in "*Americans United*" Inc. v. Walters, — F.2d — (D.C. Cir. January 11, 1973). Of course we were unaware of *Americans United* in deciding our case, but we see no conflict between the two.

In *Americans United*, the District of Columbia Circuit held that the taxpayer was not barred by § 7421 from seeking to have declared unconstitutional, and to enjoin the enforcement of, the provision of § 501(c)(3), I.R.C. of 1954, which denies tax-exempt status to an organization, otherwise exempt under that statute, which engages substantially in activities to influence legislation or participates in political campaigns.

An examination of the opinion discloses that *Americans*

United was exempt from taxation on its own income by both §§ 501(c)(3) and 501(c)(4), I.R.C. 1954. By virtue of its exemption under § 501(c)(3), contributions were deductible by donors. *Only* the 501(c)(3) exemption was revoked. As a consequence, *only* the deductibility of contributions by donors was removed; the exemption from taxation of its other income was not removed from Americans United. The Court ruled that individual donors could not litigate the deductibility of their contributions; and as a result, the only way in which the question of deductibility of contributions could be litigated was by Americans United in the suit which it filed. In a literal sense, such a suit by Americans United was not a suit for the purpose of restraining the assessment or collection of any tax as proscribed by § 7421 since no revenues taxable to Americans United could be affected.

The same is not true with respect to Jones University. In our case, the sole exemption lay in § 501(c)(3) and this exemption was the one sought to be revoked on the ground of racially discriminatory policies. If the revocation was proper, not only would contributors to Jones University not be entitled to a deduction for their contributions, but Jones University would be taxable on its other income. Because of the latter, the suit was one literally within § 7421, i.e., a suit to restrain the assessment or collection of a tax.

Thus, we think that the cases are distinguishable. Jones University's other grounds for granting the petition also do not persuade us. Therefore, with Judge Boreman dissenting, we deny rehearing. No judge eligible to do so has requested a poll on the suggestion for rehearing in banc.

PETITION DENIED.

IN THE
UNITED STATES COURT OF APPEALS
for the Fourth Circuit
No. 72-1075

MOTION FOR STAY OF MANDATE

Pursuant to rule 41(b) of the Federal Rules of Appellate Procedure, the Appellee, Bob Jones University, respectfully moves this Honorable Court to stay the mandate in the above-entitled action and not permit the same to be issued out of said cause until the further Order of the Court, on the ground and for the reason that Appellee expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari of the decision and judgment rendered in favor of Appellants and against Appellee in the above-entitled action.

Appellee further shows to the Court that unless stayed, the issuance of said mandate will cause irreparable harm to Appellee.

Wherefore, Appellee prays that the Court make and enter an appropriate Order herein staying the issuance of the mandate in the above-entitled action until further Order of the Court.

(Signatures and Certificate of Service omitted)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1075

Bob Jones University,

versus

John B. Connally, Secretary of
the Treasury of the United States
and Johnnie M. Walters, Commissioner
of Internal Revenue,

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF SOUTH CAROLINA, AT GREENVILLE.

Upon consideration of a motion of the appellee, by
counsel, for stay of mandate pending application to the United
States Supreme Court for a writ of certiorari,

It Is Ordered that the motion is denied.

Judge Boreman would grant the stay.

For the Court — by Direction.
William K. Slate, II
Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

APPLICATION FOR STAY OF MANDATE
TO THE HONORABLE CHIEF JUSTICE BURGER,
Circuit Justice for the Fourth Circuit

The Petitioner, Bob Jones University, applies for an
Order granting a stay of mandate of the Decision of the
United States Court of Appeals for the Fourth Circuit, *Bob
Jones University v. Connally, et al*, No. 72-1075, decided
January 19, 1973, and would respectfully show:

1. On September 9, 1971, the Petitioner University filed

suit in the United States District Court for the District of South Carolina, Greenville Division, against the Commissioner of Internal Revenue and the Secretary of the Treasury seeking injunctive relief preventing the Defendants from revoking the tax exempt status of the University solely because of its admissions policy. The Defendants filed a Motion to Dismiss. On November 17, 1971, the United States District Court issued its temporary injunction granting the relief requested by the University, *Bob Jones University v. Connally, et al*, 341 F. Supp. 277. The Government duly appealed to the United States Court of Appeals for the Fourth Circuit which, by divided Opinion dated January 19, 1973, reversed the District Court and remanded with instructions to grant the Government's Motion to Dismiss. The University petitioned the Circuit Court of Appeals for a rehearing which was denied on March 21, 1973. Pursuant to Rule 41(b), Federal Rules of Appellate Procedure, the University moved the Court of Appeals for a stay of its mandate which was denied.

2. The University expects and intends to petition this Court for a writ of certiorari to review the adverse decision of the United States Court of Appeals for the Fourth Circuit.

3. The University is a private, non-denominational, religious school, enrolling 4,500 students and employing a faculty and staff of 650 on its campus in Greenville, South Carolina. Since its foundation more than 40 years ago, the University has consistently adhered to certain religious beliefs and practices among which is the belief God intended the various races of men to live separate and that the intermarriage of races is contrary to the Word of God. Based upon these well-established beliefs of the University, it had adopted and administered since its foundation, an admissions policy that excludes members of the Negro Race.

4. In the summer of 1970, the Internal Revenue Service announced that it could no longer grant tax-exempt status

to schools, including religious schools, which had racially discriminatory admissions policy. From that time until the filing of this suit in the District Court, various conferences were held between attorneys for the University and the Commissioner of Internal Revenue. The result of these conferences was that the Commissioner of Internal Revenue would insist upon the University's adoption of a racially non-discriminatory admissions policy and that the University's religious beliefs prevented it from adopting such a policy.

5. The University challenged the Commissioner of Internal Revenue asserting that the threatened action of revocation was contrary to the provisions of the Internal Revenue Code, constituted an attempt to exercise power and authority not delegated to the Commissioner of Internal Revenue and was violative of the Constitution of the United States and the First and Fifth Amendments thereto.

6. In reversing, the United States Court of Appeals for the Fourth Circuit found the suit brought by the University barred by the Anti-injunction Statute, 26 U.S.C.A. 7421, and not coming within the exceptions to that Statute enumerated by this Court in *Enochs v. Williams Packing Company*, 370 U.S. 1, 82 S.Ct. 1125 (1962) and *Miller v. Standard Nut Margarine Company of Florida*, 284 U.S. 498, 52 S. Ct. 260.

7. On January 11, 1973, approximately one week before the Decision of the Fourth Circuit Court of Appeals here, the United States Court of Appeals for the District of Columbia Circuit, in *Americans United v. Walters*, No. 71-1299 (not yet reported), decided identical questions concerning the applicability of the Anti-injunction Statute in a manner opposite the Decision of the Fourth Circuit Court of Appeals in this case. The United States Court of Appeals for the District of Columbia Circuit, reversed the Lower Court Decree and remanded with instructions to consider an injunction against the Commissioner of Internal Revenue.

8. The Decision of the Court of Appeals for the Fourth Circuit found that the University would suffer irreparable injury if the Defendants were not enjoined. As stated in the Majority Opinion:

We have no doubt that Jones University will suffer irreparable injury if withdrawal of its tax exempt status is effected even if it should ultimately prevail in its argument that its tax exempt status may not legally be disturbed.

Thus, if the mandate of the Fourth Circuit Court of Appeals is not stayed, the University will suffer irreparable harm during the time its case is pending in this Court on its Petition for Certiorari. The University has asserted important and far-reaching constitutional questions concerning its right to freely practice its religious beliefs without governmental interference. As stated in the Dissenting Opinion of Judge Borman;

Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionally mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University.

The questions presented by the University are of such significance that it is respectfully submitted that this Court should grant its Petition for Certiorari.

9. In view of the finding of irreparable injury, the involvement of substantial constitutional questions and a conflicting Circuit Court decision, it is respectfully submitted that the Court below abused its discretion in failing to grant a stay of mandate pending further proceedings in this Court.

10. Counsel for the University is prepared to present oral arguments on this application should the Court desire it.

(Signatures omitted)

"Denied

4/3/73

Warren E. Burger."

No. **72 - 1470**

IN THE
Supreme Court of The United States
OCTOBER TERM, 1972

Supreme Court, U.S.
FILED
OCT 30 1972
MICHAEL RODAK, JR., CLERK

BOB JONES UNIVERSITY,

Petitioner,

v.

JOHN B. CONNALLY, Secretary of the Treasury
of The United States, and JOHNNIE M. WALTERS,
Commissioner of Internal Revenue

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional, Statutory and Rules Provisions Involved	3
Statement	7
Reasons for Granting the Writ	8
Conclusion	15
 Appendix A – Opinion Below of the United States Court of Appeals for the Fourth Circuit	
(1) Original Opinion	A-2
(2) Opinion on Petition for Rehearing	A-10
 Appendix B – Opinion Below of the United States District Court for the District of South Carolina	
	A-13
 Appendix C – Opinion of the United States Court of Appeals for the District of Columbia Circuit in <i>Americans United v. Walters, et al</i> , No. 71-1299	
	A-23

AUTHORITIES

Cases:	Page
<i>Americans United v. Walters</i> , No. 71-1299	9
<i>Armstrong v. Manyo</i> , 380 U.S. 545, 85 S.Ct. 1187 (1965)	11
<i>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</i> , 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, (1971)	11
<i>Bivens v. Six Unknown Named Agents</i> , 409 F.2d 718 (1969) ..	11
<i>Enochs v. Williams Packing Company</i> , 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962)	2, 8
<i>First Unitarian Church v. County of Los Angeles</i> , 357 U.S. 513, 78 S.Ct. 1352, 2 L.Ed. 2d 1460 (1948)	13
<i>Green v. Connally</i> , 330 F. Supp. 1150 (D.D.C. 1971), <i>aff'd per curiam sub nom. Ciot v. Green</i> , 404 U.S. 997, 92 S.Ct. 564 (1971)	12
<i>Heiner v. Donnan</i> , 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 272 (1932)	11
<i>Hill v. Wallace</i> , 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922)	11
<i>Larson v. Domestic and Foreign Commerce Corporation</i> , 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1682 (1949)	11
<i>Miller v. Standard Nut Margarine Company</i> , 284 U.S. 498, 52 S.Ct. 260, 76 L. Ed. 422 (1932)	2, 8
<i>Murdock v. Commonwealth of Pennsylvania</i> , 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)	13
<i>Panhandle Oil Co. v. State of Mississippi</i> , 277 U.S. 218, 48 S.Ct. 451	16
<i>United States v. Lee</i> , 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882)	11

<i>Waltz v. Tax Commission of the City of New York</i> , 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697 (1970)	14
<i>Ward v. Village of Monroe</i> , 409 U.S. 57, 93 S.Ct. 80 (1972)	11
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515 (1971)	11
United States Constitutional Provisions:	
Article I, Section 1	3
First Amendment	3
Fifth Amendment	4
Federal Statutes:	
26 U.S.C. §170	4
26 U.S.C. §501(a)	4, 12
26 U.S.C. §501(c) (3)	6, 7, 12
26 U.S.C. §501(c) (4)	15
26 U.S.C. §7421	2, 3, 5, 8, 15
28 U.S.C. §1254(1)	2
28 U.S.C. §1331	5, 7
28 U.S.C. §1340	5, 7
28 U.S.C. §1361	5, 7
28 U.S.C. §2201	2, 5
Internal Revenue Regulations:	
26 C.F.R. 1.50(c) (3)	5

IN THE
Supreme Court of The United States

OCTOBER TERM, 1972

No. _____

BOB JONES UNIVERSITY,

Petitioner,

v.

JOHN B. CONNALLY, Secretary of the Treasury
of The United States, and JOHNNIE M. WALTERS,
Commissioner of Internal Revenue

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

The Petitioner, Bob Jones University, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the proceedings on January 19, 1973.

OPINION BELOW

The Opinion of the Court of Appeals for the Fourth Circuit has not yet been reported. It is reproduced in Appendix A to this Petition.

The Opinion of the District Court for the District of South Carolina is reported at 341 F.Supp. 277 and is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A *infra* Page A-1) was entered on January 19, 1973. A timely Petition for Rehearing was denied on March 21, 1973 (Appendix A *infra* Page A-10). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The Petitioner initiated this action seeking injunctive relief preventing the Commissioner of Internal Revenue from revoking its tax exempt status solely because of its admissions policy, an expression of its religious beliefs. The first basic question is whether the District Court had jurisdiction to grant the relief sought, specifically:

1. Whether the Anti-injunction Statute, 26 U.S.C. § 7421 or the exception in the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, deprives the Federal Courts of jurisdiction to enjoin the Commissioner of Internal Revenue where: (a) The action sought to be enjoined would result in irreparable injury to Petitioner; (b) Petitioner has no remedy at law and (c) Petitioner has asserted substantial statutory and constitutional questions concerning the legality of the Commissioner's threatened action.

2. Whether the Anti-injunction Statute, 26 U.S.C. § 7421, or the exception in the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 is unconstitutional as applied by the Court of Appeals for the Fourth Circuit in that it would deprive Petitioner of Fifth Amendment due process rights to be heard by an impartial tribunal prior to the infliction of concededly irreparable harm for which there is no remedy at law.

3. Whether the Court of Appeals for the Fourth Circuit misapplied the exception to the application of the Anti-injunction Statute enunciated by this Court in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962) and *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 52 S.Ct. 260, 76 L. Ed. 422 (1932).

4. Whether this case involves a suit to restrain the assessment or collection of a tax so as to trigger the provisions of the Anti-injunction Statute, 26 U.S.C. § 7421.

5. Whether the Federal Courts have inherent jurisdiction under the Constitution to grant injunctive relief against the Commissioner of Internal Revenue where Petitioner has made a showing of irreparable injury and a *prima facie* showing of illegal and unconstitutional threatened action sought to be enjoined.

The second basic question is whether the revocation of the Petitioner's tax exempt status solely because of its religious beliefs as expressed in its admissions policy is illegal or unconstitutional, specifically:

1. Whether the action threatened is unlawful and contrary to the clear and unambiguous provisions of the Internal Revenue Code.

2. Whether the action is illegal and beyond the delegated powers of the Commissioner of Internal Revenue.

3. Whether the action threatened is in violation of the First Amendment to the Constitution in that it would deprive the University of its right to the free exercise of its religious beliefs and would promote, benefit and establish religion.

4. Whether the threatened action is in violation of the Fifth Amendment to the Constitution in that it would deny the University due process and equal protection of the law.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Article I, Section 1 of the Constitution of the United States provides in pertinent part as follows:

"All legislative powers herein granted shall be vested in a Congress of the United States. . . ."

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

"Congress shall make no law respecting an establishment

of religion, or prohibiting the free exercise thereof; . . . or the right of the people peacefully to assemble. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

Section 501 of the Internal Revenue Code, 26 U.S.C. § 501 provides in pertinent part as follows:

"(a) Exemption from taxation. — An organization described in sub-section (c) . . . shall be exempt from taxation under this subtitle. . . ."

• • •

(c) List of exempt organizations. — The following organizations are referred to in sub-section (a):

• • •

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, . . . or educational purposes. . . ."

Section 170 of the Internal Revenue Code, 26 U.S.C. § 170 provides in pertinent part as follows:

"(a) Allowance of deduction. —

(1) General Rule. — There shall be allowed as a deduction any charitable contribution (as defined in sub-section (c)) payment of which is made within the taxable year. A charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

• • •

(c) Charitable Contribution defined. —

For purposes of this Section, the term 'charitable contribution' means a contribution or gift to or for the use of—

(2) A corporation, trust or community chest, fund, or foundation —

• • •

(B) Organized and operated exclusively for religious, charitable . . . or educational purposes. . . .”

Section 7421 of the Internal Revenue Code, 26 U.S.C. § 7421 provides in pertinent part as follows:

“(a) Tax.— . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is a person against whom such tax was assessed.”

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides in pertinent part as follows:

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

28 U.S.C. § 1331 provides as follows:

“(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and cost, and arises under the Constitution, laws or treaties of the United States.”

28 U.S.C. § 1340 provides in pertinent part as follows:

“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. . . .”

28 U.S.C. § 1361 provides as follows:

“The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

Internal Revenue Regulation, Section 1.501(c) (3) - 1, 26 C.F.R. 1.501(c) (3) provides in pertinent part as follows:

"(d) *Exempt purposes* - (1) *In General*. (i) an organization may be exempt as an organization defined in Section 501(c) (3) if it is organized and operated exclusively for one or more of the following purposes:

(a) religious, . . .

(f) educational, . . .

(3) *Educational defined* - (i) *In general*. The term "educational" as used in Section 501(c) (3), relates to -

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates the particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) *Examples of Educational Organization*. The following are examples of organizations which, if they otherwise meet the requirements of this section are educational:

Example (1). An organization such as a primary or secondary school, a college, or a professional or trade school which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on."

STATEMENT OF CASE

The Petitioner, Bob Jones University, is an eleemosynary corporation chartered in South Carolina, which carries on religious and educational activities in Greenville, South Carolina, enrolling 4,500 students at the college level and employing a faculty and staff of 650. It is a fundamentalistic religious school whose educational activities are permeated with its religious beliefs and practices. For example: all University activities including classroom instruction are begun and ended with prayer; *the University refuses to accept funds or grants from any government, federal, state or local, because it believes such acceptance would cause the surrender of its religious principles, and infringe upon its right to operate the school in harmony with such principles.* Among its deep religious convictions is the belief that the Bible forbids the intermarriage of the races. The University has exercised this religious belief since its inception in 1929 by denying admission to Negroes and providing for expulsion of students who date members of any race other than their own. It has maintained tax exempt status under 26 U.S.C. § 501(c) (3) since its inception during which period neither its religious beliefs as expressed in its admissions policy nor the applicable provisions of the Internal Revenue Code has changed.

In the summer of 1970, the Commissioner of Internal Revenue issued press releases stating that schools with discriminatory admissions policies, including religious schools such as the University, would have their tax exempt status revoked and advanced assurance of deductibility of contributions withdrawn. In response to this action the University filed suit against the Commissioner of Internal Revenue and the Secretary of the Treasury requesting temporary and permanent injunctive relief to restrain the government from revoking its tax exempt status solely because of its religious beliefs and practices as expressed in its admissions policy. Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1340 and 1361 and under the inherent jurisdiction conferred by the Constitution of the United States.

The United States District Court for the District of South Carolina assumed jurisdiction and granted the University a temporary injunction and refused the Government's Motion to Dismiss (Appendix B, page A-22), upon its finding that:

The conclusion is inescapable that the primary purpose of the Defendants in threatening the revocation of the Plaintiff's tax exempt status is not to assess and collect taxes, but to compel through the use or threat to use taxing powers to require private educational and religious institutions to comply with certain political or social guidelines with regard to the question of racial integration. (Appendix B, page A-20)

And upon its further findings that University would suffer irreparable damage through loss of contributions if the Defendants were not enjoined and that the Defendants had surpassed or were in the process of surpassing their statutory authority.

With Senior Circuit Judge Boreman dissenting, the Court of Appeals reversed, holding that although the University would suffer irreparable injury if the Government were not enjoined, the Anti-injunction Statute, 26 U.S.C. § 7421, deprived the Court of Jurisdiction. A timely Petition for Rehearing in Banc was made on February 5, 1973, and denied by a divided court on March 21, 1973. The University applied for a stay of mandate in order to seek a review of the matter in this Court which was denied by the Court of Appeals on March 26, 1973, Judge Boreman dissenting. On March 28, 1973, an Application for a Stay of Mandate was made to the Chief Justice of this Court which was denied on April 3, 1973.

REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit Court of Appeals renders ineffective the exceptions to Anti-injunction Statute enunciated by this Court in *Enochs v. Williams Packing Company*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962) and *Miller v. Standard Nut Margarine Company*, 284 U.S. 498, 52 S. Ct. 260, 76 L.Ed. 422 (1932) and would effectively deprive

the Federal Courts of power to restrain illegal and unconstitutional action of Federal taxing authorities where the assessment and collection of taxes is only remotely involved. It would give life to Mr. Chief Justice Marshall's observation "The power to tax involves the power to destroy." The *Williams Packing* test as applied by the Fourth Circuit here raises serious Fifth Amendment due process questions. The Internal Revenue Code makes no mention of admissions policies as a criteria for exempt status and only provides that *bona fide* educational institutions shall be exempt. By imposing additional requirements for exempt status, Treasury officials are attempting to exercise power and authority not delegated them by Congress. Furthermore, the University has asserted fundamental constitutional issues relating both to the question of jurisdiction and the merits which require this Court's attention. Finally, the case is in direct conflict with the Court of Appeals for the District of Columbia Circuit in *Americans United v. Walters*, No. 71-1299, decided January 11, 1973, (not yet reported, it is reproduced in Appendix C to this Petition).

The University contends that tax invoked here is nothing but a tax or penalty on its religious beliefs and practices and does not involve a *bona fide* attempt to add to the revenues of the United States. As stated by this Court in *Williams Packing*, *supra*:

The manifest purpose of Section 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner, the United States is assured of prompt collection of its lawful revenue *Id.* at 7.

Here there are no "disputed sums" involved and the University's loss of contributions can never be determined in "a suit for refund." Surely Congress did not intend the taxing statute to be used in a manner to assure the "prompt collection" of forfeited religious beliefs and practices guaranteed by the First Amendment to the Constitution. By enacting the Anti-

injunction Statute, Congress did not intend to unleash the Federal Taxing Authority and enable them to force otherwise illegal and unconstitutional measures upon the citizenry.

The action threatened by the Government would first result in withdrawal of advance assurance of deductibility of contributions, then revocation of tax-exempt status ultimately leading to assessment and collection procedures. Even if advanced assurance and tax exempt status were withdrawn simultaneously and suit immediately filed in either the District Court or the Tax Court, the University would suffer irreparable harm in that individuals who would otherwise contribute to the University would either curtail their donations or divert their donations to other schools and religions enjoying the blessings of Internal Revenue Service granted advance assurance of deductibility of contributions and tax-exempt status. The most rapid progress in such litigation would result in a substantial contribution drought before the University's position could ultimately be vindicated. The loss of these contributions could never be recovered. In view of the time required by complex litigation involving substantial constitutional questions, this loss could well prove fatal.

The tax the government seeks to impose may be paid in other than legal tender; payment may be accomplished by relinquishment of religious beliefs and practices. All the University need do is to change its admissions policy in violation of its beliefs and the government is satiated. However, if the government has its way and if the University does not yield, it will be irreparably harmed because of its refusal to relinquish religious beliefs and practices, all without judicial scrutiny. The crux of the University's insistence that the Anti-injunction Statute is inapplicable rests upon the undisputed fact that no tax would be payable, indeed, there would be no controversy if the University changed its religious beliefs and practices.

The Fourth Circuit's application of the *Williams Packing* test would subject the University to the mercy of the Com-

missioner of Internal Revenue, an official charged with the collection of taxes and an advocate of the Service's policy on school admissions policies. Such is clearly violative of the due process clause of the Fifth Amendment. It is well settled that due process requires a hearing before an impartial tribunal before the imposition of sanction so harsh as to result in irreparable injury. *Wisconsin v. Constantieau*, 400 U. S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515 (1971). Due process requirements are applicable to the taxing powers of the Federal Government, *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 272 (1932). The opportunity to be heard "... must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manyo*, 380 U.S. 545, 552; 85 S.Ct. 1187, 1191 (1965). The tribunal must be impartial. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972).

When fundamental freedoms guaranteed by the Constitution are placed in imminent jeopardy by actions of Federal officers operating in their official capacity, the Federal judiciary has inherent jurisdiction to give substance to these Constitutional guarantees through exercise of its general equity power. This Court has recognized on many occasions the existence of such judicial authority. *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882); *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457, 93 L.Ed. 1682 (1949), *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, (1971). The power to enjoin unconstitutional action when clothed in a taxing statute has been specifically exercised in the face of the Anti-injunction Statute defenses. *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922). "Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its Courts standing powerless to prevent a clear transgression by the government of the constitutional right of a person with standing to assert it." *Bivens v. Six Unknown Named Agents*, 409 F.2d 718, 723, (1969).

Applicable Sections of the Internal Revenue Code are clear and unambiguous commanding exempt status for the University. 501(a) states that the organizations described "shall" be exempt. 501(c)(3) states that organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes . . ." are those granted exemption under 501(a). There is no reference in the Internal Revenue Code to admissions policies of private universities. The University here clearly is an organization mandated as exempt by the Internal Revenue Code.

The Internal Revenue Service has consistently since at least 1942 applied these provisions to the University and granted it exempt status. There has been no change in the Internal Revenue Code and no change in the University's admissions policies during its more than 40 years of existence.

The Secretary of the Treasury and the Commissioner of Internal Revenue are delegated the authority to interpret and enforce the Internal Revenue Code as passed by Congress. They have no authority to make law. However, they attempt to twist and distort clear and unambiguous statutory provisions which have been repeatedly re-enacted by Congress at times when the University enjoyed exempt status. By this action they are attempting to usurp the Legislative power of the Federal Government delegated by the Constitution to the Congress of the United States.

The reliance of the Government and the court below upon the decision in *Green v. Connally*, 330 F.Supp. 1150 (D. D.C. 1971), *aff'd per curiam sub nom. Ciot v. Green*, 404 U.S. 997, 92 S. Ct. 564 (1971), is misplaced. On the jurisdictional issue, the *Green* case is consistent with the University's position here. Moreover the substantive issues raised by the University were not involved in *Green* and the *Green* court specifically refused to consider the ramifications of the injection of First Amendment rights into that case. In connection with these rights, the *Green* court recognized that religious freedoms may be involved.

The special constitutional provisions insuring freedom of religion also insure freedom of religious schools, with policies restricted in furtherance of religious purpose. . . . We are not called upon to consider the hypothetical inquiry whether tax exemption or tax deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion. 330 F.Supp. at 1169.

The *Green* decision has no application in the context of *Williams Packing* where the *Green* court itself specifically refused to entertain the constitutional questions asserted by the University.

The Constitutional questions raised by the University are substantial and deserve this Court's attention. In essence, the Government seeks to tax the University and to divert contributions because of its religious beliefs. Such is clearly in violation of the First Amendment to the Constitution of the United States. This Court has consistently held that First Amendment rights may not be taxed. Furthermore, "When Government denies a tax exemption because of a citizen's belief, it penalizes that belief." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case here is strikingly similar to that in *First Unitarian Church v. County of Los Angeles*, 357 U.S. 513, 78 S.Ct. 1352, 2 L.Ed. 2d 1460 (1948), where Mr. Justice Black stated:

California, in effect had imposed a tax upon belief and expression. In my view, a levy of this nature is wholly out of place in this country; so far as I know, such a thing has never been attempted before. I believe it constitutes a palpable violation of the First Amendment. . . . The mere fact that California attempts to exact this ill-concealed penalty from individuals and churches and that its validity has to be considered in this Court, only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment.

The University respectfully submits that the government is now attempting the very thing so soundly condemned by Mr. Justice Black in *First Unitarian Church*. The practical effect of the Decision of the Fourth Circuit is to allow Treasury officials to tax the University because of its religious beliefs.

The "Benevolent Neutrality" Doctrine enunciated by Mr. Chief Justice Burger in *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697 (1970), is being ignored by Treasury officials. Not only do they seek to tax the University, with consequential entanglement in its affairs, but also their attack is selective — penalizing those who adhere to the University's beliefs and favoring others. Such a policy clashes with long established concepts of due process and equal protection.

The Senior Circuit Judge in his dissent below concisely states the University's situation:

Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionally mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University. To permit such threatened action in these circumstances without affording the University a right to judicial consideration would tend to demonstrate that the age old phrase — "*The power to tax is the power to destroy*" — is literally true.

Appendix A at A-9.

The crack in the Constitutional protections opened by the Government action here has tremendous potential. If the Government is shielded from effective and meaningful judicial scrutiny by the Tax Statutes, it can disregard the Constitution. The very purpose of the Constitution to impose restraints upon government and guarantee freedoms to the people would be substantially handicapped, if not destroyed, if Treasury officials can demand tribute for the exercise of those freedoms.

Furthermore, the decision of the Fourth Circuit in the instant case is directly in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Americans United v. Walters*, (Appendix C, *infra*). The District of Columbia Court referred to the jurisdictional arguments advanced by the Government in this case as "identical" to those rejected in *Americans United*. Appendix C, page A-35. While the Fourth Circuit held that the Anti-injunction Statute, 26 U.S.C. § 7421 (a), deprived the Court of jurisdiction, the D.C. Circuit reversed and remanded with instruction to assume jurisdiction where the Government asserted identical anti-injunction defenses.

In its Opinion denying the University's Petition for Rehearing, the Fourth Circuit states it sees no conflict between *Americans United* and this case. The Court below attempts to distinguish the cases upon the basis that in no event would *Americans United* be required to pay taxes on its own income due to its qualification under 26 U.S.C. § 501(c) (4). Admittedly, the University cannot qualify under 26 U.S.C. § 501(c) (4) but the crux of the action sought to be enjoined here, the loss of advance assurance of deductibility of contributions and the diversion of contributors themselves is exactly the same as in *Americans United*. It is this action on the part of Treasury officials which results in irreparable injury for which there is no remedy. The Fourth Circuit simply asserts a distinction without a difference. Not only do the Fourth and District of Columbia Circuits disagree on the application of the Anti-injunction Statute (26 U.S.C. § 7421), they disagree over the disagreement.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals raises substantial questions relating to statutory and constitutional limitations upon federal taxing powers. This court should give meaning to the statement of Mr. Justice

Oliver Wendell Holmes: "The power to tax is not the power to destroy while this Court sits"* by granting this Petition.

Respectfully Submitted,

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**Panhandle Oil Co. v. State of Mississippi*, 277 U. S. 218, 223; 48 S. Ct. 451, 453.

Appendix A

UNITED STATES COURT OF APPEALS For The Fourth Circuit

No. 72-1075

BOB JONES UNIVERSITY,

Appellee,

v.

JOHN B. CONNALLY, Secretary of the
Treasury of the United States and
JOHNNIE M. WALTERS, Commissioner of
Internal Revenue,

Appellant.

Appeal from the United States District Court for the
District of South Carolina, at Greenville.
Charles E. Simons, Jr., District Judge.

(Argued October 4, 1972

Decided January 19, 1973)

Before BOREMAN, WINTER and BUTZNER, Circuit Judges.

Leonard J. Henzke, Jr., Attorney, Department of Justice, (John K. Grisso, United States Attorney, Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks, Grant W. Wiprud, Attorneys, Department of Justice, Tax Division, on brief) for Appellants; J. D. Todd, Jr., (Wesley M. Walker, James H. Watson, O. Jack Taylor, Jr., and Leatherwood, Walker, Todd and Mann on brief) of Appellee.

WINTER, Circuit Judge:

Bob Jones University (Jones University), a non-profit educational institution which concededly practices racial discrimination in the admission of students, sought a preliminary and permanent injunction to prevent Treasury officials from terminating its tax-exempt status. Treasury officials had begun administrative proceedings to that end in accordance with an announced policy of withdrawing tax-exemption and deductibility-assurance rulings of schools having racially discriminatory policies, when suit was filed. The district court denied the Treasury officials' motion to dismiss for lack of jurisdiction and granted an injunction *pendente lite*. Because we conclude that the district court lacked jurisdiction under § 7421 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421 to grant the requested relief, we reverse and remand the case for dismissal of the complaint.

I

Jones University is a fundamentalist religious organization which subscribes to the belief that God intended the various races of men to live separate and apart, and that intermarriage of different races is contrary to God's will and the teaching of the Scriptures. In furtherance of these beliefs, Jones University prohibits the admission of black students, it prohibits students it does admit from dating or marrying members of another race, whether students or not, and it accepts some Oriental students but only on condition that they will not date outside of their own race. Jones University has enjoyed tax-exempt status since at least April 30, 1942, under § 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 501(c)(3) and the predecessor code.

On July 10 and July 19, 1970, the Internal Revenue Service (IRS) announced publicly that it could no longer legally justify allowing tax-exempt status to private schools which have racially discriminatory admission policies, nor could it treat gifts to such schools as tax-deductible charitable contributions. It also stated that, although the non-discrimination

requirement would not affect a school's ordinary admissions policies which had no relation to race, the requirement would prohibit allowance of the tax benefits to church-related schools which discriminated on the basis of race. On November 30, 1970, IRS wrote a letter of inquiry to each school in the United States, including Jones University, announcing its new policy and requesting each school to furnish specific information regarding its admissions policy within thirty days. Jones University responded that it did not admit blacks.

There followed various communications and meetings between IRS and representatives of Jones University, each refusing to deviate from its original position. The suit was filed on September 9, 1971, and no further administrative steps were taken. Had suit not been filed there would have been further conferences at the level of the District Director and the National Office in Washington. Only if Jones University declined to abandon its racially discriminatory policies and IRS declined to alter its announced policy would Jones University's tax-exempt status be revoked, its records audited and a notice of proposed tax deficiencies issued. Even then, Jones University would have additional opportunities to seek administrative relief. See 9 Mertens Law of Federal Income Taxation (Rev.), §§ 49.110, 49.112, 49.114, 49.115, 49.118-49.124. If administrative relief was not forthcoming, IRS would issue a notice of deficiency, the legality and correctness of which could be litigated in the Tax Court, 26 U.S.C.A. § 6213, or, alternatively, Jones University could pay the tax and sue for a refund on the ground of illegality, 28 U.S.C.A. § 1346; 26 U.S.C.A. § 7422.

II

The controlling statute reads:

§ 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any

tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions in the statute are inapplicable: §§ 6212(a) and (c) and 6213(a) permit suits in the Tax Court to litigate the legality and correctness or deficiency assessments and § 7426 (a) and (b) (1) relates to foreclosure proceedings and judicial sales with regard to property on which the United States has a tax lien and permits the United States to be joined and participate in cases of this nature.

Jones University contends, and the district court concluded, that the statute is inapplicable because no formal assessment of deficiencies had been made and thus the suit did not seek to enjoin an "assessment or collection" of any tax. We disagree. First, the administrative proceedings which had as their object the withdrawal of tax-exemption and deductibility-assurance rulings are directly involved with the assessment and collection of taxes from Jones University and those making contributions thereto. If those rulings are withdrawn, Jones University will be liable for taxes on any net income which it realizes and contributors to Jones University may not deduct from their gross income the amounts of their contributions. Either event would result in an increase in taxes.

A number of cases hold, or make clear, that a suit to enjoin the withdrawal of tax-exemption rulings, the withdrawal of which would ultimately result in potentially greater tax revenues, constitutes a suit to enjoin the "assessment" of a tax within the meaning of § 7421, and we are persuaded to follow them. *J. C. Penney Co. v. United States Treasury Dept.*, 439 F.2d 63 (1971), aff'd 319 F.S. 1023 (S.D. N.Y. 1970), cert. den. 404 U.S. 869 (1971); *Koin v. Coyle*, 402 F. 2d 468 (7 Cir. 1968); *Kennedy v. Coyle*, 352 F.2d 867 (7 Cir. 1965); *Zamaroni v. Philpott*, 346 F.2d 365 (7 Cir. 1965); *Crenshaw County Private School Foundation v. Connally*, ___ F.S. ___ (M.D. Ala. 1972) (on motion to dismiss); *Horton v. Humphrey*, 146 F.S. 819, 821 (D. D.C.), aff'd 352 U.S. 921 (1956)

(per curiam). The common sense of the matter is that where, as we have shown, the necessary result of granting the relief prayed would be to prevent the assessment of any tax, § 7421 is applicable.

The circumstances under which § 7421 is not to be applied, when it would otherwise appear to be applicable, are spelled out in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962). The test to permit a taxpayer successfully to enjoin the assessment or collection of a tax is twofold: first, he must show irreparable injury to himself if collection were effected, and second, he must show that "under no circumstances could the Government ultimately prevail" in its assertion of tax liability. 370 U.S. at 7. Otherwise, his remedy is to litigate the validity or amount of the tax by the statutory routes, i.e., appeal of assessment, or payment of the tax and suit for refund.

We have no doubt that Jones University will suffer irreparable injury if withdrawal of its tax-exempt status is effected even if it should ultimately prevail in its argument that its tax-exempt status may not legally be disturbed. Of course, the tax on any net income which may be imposed would be recoverable, but we would be naive indeed not to recognize the substantial portion that contributions play in the gross income of any institution of higher learning and the adverse effect on those contributions if their deductibility for income and estate tax purposes of the donors is disallowed. If Jones University is required to litigate its tax-exempt status after that status has been withdrawn, we can predict with confidence that during the period of litigation it will lose gifts and contributions which will never be recoverable even if it is successful in having its tax-exempt status restored. Thus, the first test of *Williams Packing*, irreparable injury, is met, and we consider the second.

We cannot conclude that "under no circumstances" could IRS be successful in withdrawing Jones University's favorable tax rulings. Although we decline the invitation of counsel for Jones University, extended in oral argument, to decide this case finally on the question of whether Jones University is

entitled to tax-exempt status, and consequently we are not to be understood as expressing any view on the ultimate merits of the dispute between IRS and the taxpayer, the recent decision in *Green v. Connally*, 330 F.S. 1150 (D. D.C. 1971), aff'd per curiam sub nom. *Coit v. Green*, 404 U.S. 997 (1971) makes apparent our conclusion. *Green* was a class action by Negro parents of school children attending public schools in Mississippi to enjoin U. S. Treasury officials from according tax-exempt status and deductibility of contributions to private schools in that state which discriminated against Negro students. The relief prayed was granted and on appeal the Supreme Court affirmed per curiam.

The essence of the decision of the D. C. district court may be distilled as follows: Section 501(c)(3) of the Internal Revenue Code, in granting tax-exempt status to "religious" and "educational" institutions requires that they also satisfy the common law concept of "charitable." At common law a charitable trust cannot be created for a purpose which is illegal or whose accomplishment would tend to frustrate some well-settled public policy. Hence there is presently serious doubt, in view of shifting racial attitudes as reflected in legislation and court decisions, that a charitable trust can legally be established, or an existing trust enforced, which establishes racially discriminatory educational institutions. Federal tax exemptions and deductions are generally not available for activities contrary to declared federal public policy. In the light of the Fourteenth Amendment, the decisions of the Supreme Court on the subject of school desegregation and the Civil Rights Act of 1964, the exemptions and deductions provided for charitable educational institutions are not available for private schools discriminating on grounds of race.

Because of the breadth of these holdings and their acceptance by the Supreme Court, we cannot conclude that IRS's contemplated withdrawal of tax-exemption and deductibility-assurance rulings is frivolous or that IRS "under no circumstances" may ultimately prevail. It follows that the second

requirement of *Williams Packing* has not been met and § 7421 is a complete bar to maintaining the action.

A final comment is necessary. While the district court found, and the dissenting member of the panel stresses, that the "primary purpose" of the Treasury officials in threatening to revoke Jones University's favorable tax status was not to assess and collect taxes but to exact compliance with certain political or social guidelines, i.e., discontinuance of racial discrimination, we think that the finding is irrelevant to the proper disposition of this case. Substantially the same argument was made and rejected in *Bailey v. George*, 259 U.S. 16 (1922). There the Court prohibited enjoining a collector of internal revenue from collecting the Child Labor Tax despite the argument that the tax was not for the purpose of raising revenue, but for the purpose of regulating child labor. In the *Bailey* case there was even more reason to accept the argument than in the case at bar because on the same day that Mr. Chief Justice Taft wrote that an injunction against the collection of the tax would be improper, the Court ruled, again in an opinion by Mr. Chief Justice Taft, that the Child Labor Tax was unconstitutional. *Child Labor Tax Case*, 259 U. S. 20 (1922). Hence, we deem rejection of the argument in *Bailey* as conclusive here.

Similarly, in *Singleton v. Mathis*, 284 F.2d 616 (8 Cir. 1960), the Court affirmed the denial of an injunction against the director of internal revenue who was proceeding to collect a gaming tax of \$250 on each of two pinball machines. It appears to be obvious that the purpose of the tax was not to raise revenue, but was to control gambling because a \$10 tax was the amount assessed against amusement devices by the same statute.

Accordingly, we reverse the judgment of the district court and remand the case for dismissal of the complaint.

REVERSED AND REMANDED.

BOREMAN, Senior Circuit Judge, dissenting:

For the reasons cogently stated by the district court in *Bob Jones University v. Connally*, 341 F. Supp. 277 (D. S.C. 1971), I respectfully dissent. I would add the following comments and observations.

Under § 7421 of the Internal Revenue Code, as interpreted in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), the burden upon one seeking to enjoin the collection of a tax is huge, indeed. A showing of irreparable harm, "such as the ruination of the taxpayer's enterprise," says the Court, 370 U.S. at 6, is *not* enough. It must be shown that "under no circumstances could the Government ultimately prevail." 370 U. S. at 7. It would appear obvious that, as a practical matter, such a standard could possibly be met only in the most exceptional and unusual circumstances.¹

The reason for this exceptional administrative power has been found in the "manifest purpose" of § 7421, *i. e.*, that the United States must be "assured of prompt collection of its lawful revenue." *Williams Packing Co.*, *supra*, 370 U.S. at 7. However, the United States is not primarily concerned here with the collection of revenue. The district court expressly found that the "primary purpose" of the Treasury officials in threatening to revoke the University's tax exempt status and tax deductible benefits to donors is *not* to assess and collect taxes, but through the use of taxing powers "to require private educational and religious institutions to comply with certain political or social guidelines." 341 F.Supp. at 284.

The University contends, *inter alia*, that the threatened actions of the Treasury officials would violate the First Amendment in that such actions would (1) deprive the University of the free exercise of its religious beliefs and, (2) promote, benefit and establish other religions. It certainly is not to be assumed that the Commissioner is possessed of "administrative

¹For instance, it is unlikely that this court would assume to state positively, in advance, what the Supreme Court would hold under *any* given set of circumstances. To do so would be presumptuous, indeed.

expertise" with respect to the question presented, or that his legal opinion is in any way entitled to exceptional weight. Indeed, it would appear to me that the threatened acts of the defendants may well be subject to serious challenge as arbitrary and capricious and beyond the scope of their statutory power and authority.²

The majority decision would permit the Government to irreparably damage the University by actions taken upon a legal determination by the Commissioner not directly related to any "tax law," for a purpose not directly related to the collection of any tax, upon the merest chance that the Commissioner might be right. On the facts of this case, I can find no reason, purpose or justification for permitting the Government, absent proper judicial scrutiny going substantially beyond the "under no circumstances" test of *Williams Packing Co.*, to so proceed against the University. Surely such was not the intent of Congress in enacting § 7421, nor the meaning of the Supreme Court in *Williams Packing Co.*

Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionally mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University. To permit such threatened action in these circumstances without affording the University a right to judicial consideration would tend to demonstrate that the age old phrase — "*The power to tax is the power to destroy*" — is literally true.

No case is cited by the Government which applies the strict *Williams Packing Co.* test in circumstances similar to those in the instant case. I reach the conclusion that the application of that test here may well present a question as to the constitutionality of § 7421.

²The district court found that the University "has made a prima facie showing that the defendants have surpassed, or are in the process of exceeding, their statutory authority as granted to them by the Congress in the Internal Revenue Laws." 341 F.Supp. at 285.

**UNITED STATES COURT OF APPEALS
For The Fourth Circuit**

No. 72-1075

Bob Jones University,

Appellee,

v.

John B. Connally, Secretary of the
Treasury of the United States and
Johnnie M. Walters, Commissioner of
Internal Revenue,

Appellant.

Appeal from the United States District Court for the
District of South Carolina, at Greenville.
Charles E. Simons, Jr., District Judge.

Submitted February 5, 1973

Decided March 21, 1973.

Before BOREMAN, Senior Circuit Judge, and WINTER and
BUTZNER, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

Bob Jones University (Jones University) petitions for rehearing and suggests rehearing in banc on the ground, *inter alia*, that our decision is in conflict with the decision of the District of Columbia Circuit in "*Americans United*" Inc. v.

Walters, ___ F.2d ___ (D.C. Cir. January 11, 1973). Of course we were unaware of *Americans United* in deciding our case, but we see no conflict between the two.

In *Americans United*, the District of Columbia Circuit held that the taxpayer was not barred by § 7421 from seeking to have declared unconstitutional, and to enjoin the enforcement of, the provision of § 501(c)(3), I.R.C. of 1954, which denies tax-exempt status to an organization, otherwise exempt under that statute, which engages substantially in activities to influence legislation or participates in political campaigns.

An examination of the opinion discloses that *Americans United* was exempt from taxation on its own income by both §§ 501(c)(3) and 501(c)(4), I.R.C. 1954. By virtue of its exemption under § 501(c)(3), contributions were deductible by donors. *Only* the 501(c)(3) exemption was revoked. As a consequence, *only* the deductibility of contributions by donors was removed; the exemption from taxation of its other income was not removed from *Americans United*. The Court ruled that individual donors could not litigate the deductibility of their contributions; and as a result, the only way in which the question of deductibility of contributions could be litigated was by *Americans United* in the suit which it filed. In a literal sense, such a suit by *Americans United* was not a suit for the purpose of restraining the assessment or collection of any tax as proscribed by § 7421 since no revenues taxable to *Americans United* could be affected.

The same is not true with respect to Jones University. In our case, the sole exemption lay in § 501(c)(3) and this exemption was the one sought to be revoked on the ground of racially discriminatory policies. If the revocation was proper, not only would contributors to Jones University not be entitled to a deduction for their contributions, but Jones University would be taxable on its other income. Because of the latter, the suit was one literally within § 7421, i.e., a suit to restrain the assessment or collection of a tax.

Thus, we think that the cases are distinguishable. Jones University's other grounds for granting the petition also do

A-12

not persuade us. Therefore, with Judge Boreman dissenting, we deny rehearing. No judge eligible to do so has requested a poll on the suggestion for rehearing in banc.

PETITION DENIED.

BOB JONES UNIVERSITY v. CONNALLY

Cite as 341 F.Supp. 277 (1971)

Appendix B

BOB JONES UNIVERSITY, Plaintiff,

v.

**John B. CONNALLY, Secretary of the
Treasury of the United States, and
Johnnie M. Walters, Commissioner of
Internal Revenue, Defendants.**

Civ. A. No. 71-891.

United States District Court,
D. South Carolina,
Greenville Division.

Nov. 17, 1971.

* * * * *

John K. Grisso, U. S. Atty., Greenville, S. C., Stanley F. Krysa, Atty., U. S. Justice Dept., for defendants.

ORDER

SIMONS, District Judge.

This matter is before the court upon plaintiff's Complaint seeking an injunction *pendente lite*, and upon defendant's Motion to Dismiss plaintiff's Complaint for lack of jurisdiction.

The court received briefs and heard arguments on October 4, 1971, with regard to both the Motions. From the Complaint, affidavits and supporting documents, and the deposition of William H. Connett, Assistant to the Commissioner of Internal Revenue, and from a study of statutory provisions, rules and regulations and authorities involved, the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Bob Jones University is an eleemosynary corporation, organized and granted its certificate of incorporation on November 20, 1952. The University's predecessor was known as Bob Jones College, which was founded near Panama City, Florida, in 1926. The plaintiff was originally founded and has continued to exist as a fundamentalistic, religious organization which has chosen the field of education, principally at the college level, as the vehicle through which to teach and promulgate its fundamentalistic religious beliefs. The creed of the college as originally founded and the purpose clause of its charter is as follows:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures; combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel; unqualifiedly affirming and

* * * * *

J. D. Todd, Jr., Wesley M. Walker, O. Jack Taylor, Jr., Greenville, S. C., for plaintiff.

teaching the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Savior, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.¹

2. It further appears from the affidavit of Dr. Bob Jones, III, President of the University, as well as from the affidavits of Dr. Bob Jones, Jr., Chairman of the Board, and Dr. R. K. Johnson, Secretary-Treasurer and Business Manager, that the University's fundamentalistic religious beliefs and practices include the belief and principle that God intended that the various races of men should live separate and apart, and that the inter-marriage of different races is contrary to the will of God, and to the teachings of the Holy Scriptures. In keeping with this religious belief and principle, the University has adopted an admissions policy prohibiting the admission of black students to the University.² The plaintiff has also adopted a rule prohibiting its students from dating or marrying members of another race, whether students or not. Violation of this rule results in expulsion from the University. The University believes it would be impossible to enforce that rule if the University were to adopt a racially nondiscriminatory admissions policy (affidavit of Dr. Bob Jones, III). The University requires all students to attend daily chapel services at which the religious views and principles of the University are taught, and all classes and meetings held under the University

sponsorship are begun and ended with prayer. All students, with inconsequential exceptions, are required to take courses in religion each semester. All faculty members are required to teach and adhere to the religious beliefs and principles of the school, and any member of the faculty or member of the student body teaching or promoting religious beliefs contrary to those of the University is subject to dismissal. The admissions standards of the University relate not only to academic achievement but also to the religious convictions of a given applicant as well. The University does not now accept, and has not in the past accepted, federal or state grants in aid, nor does it participate in any programs financed by the federal or state governments because the University apparently understands that if it did so it would be required to adopt a racially nondiscriminatory admissions policy which would be contrary to its religious beliefs and practices.

3. The University has apparently enjoyed tax exempt status since its formation, although the records of the University do not go back that far in this regard. The record contains a letter dated March 30, 1951,³ received by the University from the then Deputy Commissioner, advising that it qualified as a tax exempt organization, which also referred to a similar ruling of April 30, 1942. The record substantiates that there has been no significant change in the University's practices, principles, or policies since that date.

4. News releases of the Internal Revenue Service issued on July 10 and July 19, 1970, constituted the first threat to the University's tax exempt status. Thereafter the University received a letter of inquiry from the District Director of Internal Revenue requesting information concerning the admissions policies of the University with regard to race.

1. See Page 2 of the affidavit of Dr. Bob Jones, III, and certified copy of certificate of incorporation attached thereto.

2. One married black part-time student has recently been admitted to the University.

3. Copy of letter attached to the affidavit of Dr. R. K. Johnson, Secretary-Treasurer and Business Manager of the University.

A copy of that letter is attached to the affidavit of Dr. Bob Jones, III. The University's reply was in the form of a letter dated December 30, 1970, which is attached to the affidavit of Mr. William H. Connett. During 1971 various conferences and discussions were held between officials of the Internal Revenue Service, including former Commissioner Randolph W. Thrower, and the present Commissioner, Johnnie M. Walters, and attorneys for the plaintiff. These discussions culminated on or about September 8, 1971, when counsel for the plaintiff concluded that a clear threat existed that the University's status as a tax exempt organization was about to be revoked, and that the advance assurance of deductibility of contributions previously given by the Internal Revenue Service to its contributors was about to be withdrawn.

5. The following day, September 9, 1971, the plaintiff instituted this action, alleging that this threatened action would inflict irreparable harm upon the University, that such threatened action was unlawful in that it exceeded the authority vested in the defendants by Congress, was contrary to the provisions of § 501(c) (3) of the Internal Revenue Code, and would be in violation of the First and Fifth Amendments to the Constitution of the United States. Plaintiff, accordingly, requested temporary and permanent injunctive relief from this court.

[1] 6. One of the grounds urged by defendants in support of their Motion to

Dismiss is that plaintiff has not exhausted the administrative remedies available to it under Revenue Procedures 68-17 and 69-3. Mr. Connett's affidavit sets forth the administrative procedures which would be employed were this court not to grant injunctive relief. However, from his affidavit and deposition it appears that there remains very little doubt as to the ultimate loss of plaintiff's tax exempt status. In his deposition Mr. Connett states that plaintiff's tax exempt status would be revoked under the existing law, unless the plaintiff chose to change its admissions policy to comply with the requirements of the IRS and admit black students on a nondiscriminatory basis.⁴ It is thus concluded that any attempt by the plaintiff to follow these administrative procedures would most probably be a useless act, inasmuch as the decision to revoke the tax exempt status of any organization not willing to adopt a racially nondiscriminatory admissions policy apparently has already been made by the Washington Office of the Internal Revenue Service.

A review of the procedures outlined in Mr. Connett's affidavit indicates that by subjecting itself to these procedures the plaintiff would likely suffer irreparable damage. Mr. Connett reveals a sequential process by which, first, advanced assurance of deductibility of contributions would be withdrawn, and second, the University would be denied tax exempt status and then taxes assessed and collected. Undoubtedly a period of many

4. Numerous news releases with a Washington dateline have been noted recently in which it is indicated that many private schools in this and other states have been notified by the IRS that they will lose their tax exempt status unless they certify that they have adopted a racial nondiscriminatory admissions policy. Furthermore, plaintiff submitted the affidavit of Mr. Joe N. Cocke, who states that the IRS withdrew its prior assurance of deductibility of contributions made to Fayette Academy, and thereafter revoked the Academy's tax exempt status. Attached to his affidavit is a letter dated January 12, 1971, signed by the District Director of the Internal Revenue Service,

Atlanta, Georgia. The District Director referred to a previous letter dated December 3, 1970, notifying the Academy of the suspension of advance assurance of deductibility of contributions to that organization pending final determination of its status. The letter goes on in Paragraph 3 to advise the academy of its right to protest and its right to have conferences at both the District and National Office levels. The fourth paragraph of that letter states: "A conference at either the District or National Office would probably serve no useful purpose if you have no intention of adopting a racially nondiscriminatory admissions policy. . . ."

months would elapse between the time that advanced assurance of deductibility of contributions would be withdrawn and a tax finally assessed and collected, thus requiring redress in the courts pursuant to 26 U.S.C.A. § 6213; 28 U.S.C.A. §§ 1346(a) (1), 1491; 26 U.S.C.A. §§ 6532, 7452. It is to be expected that while the Internal Revenue Service is conducting administrative conferences leading to the assessment and collection of a tax, the plaintiff's contributions, upon which it relies heavily, would be curtailed, if not eliminated altogether. Under these circumstances these administrative procedures would serve no useful purpose.

[2] The plaintiff would likely suffer irreparable harm if the threatened action is not enjoined. Plaintiff submitted, in addition to the affidavits previously referred to, the affidavit of another of its counsel, O. Jack Taylor, Jr.; John E. Fowler, C.P.A., employed by the University for the past twenty-five years or more; Jo Ann Hatcher, donations secretary to the University; and affidavits from ten of its contributors. The force and effect of these affidavits is as one might expect: the financial lifeblood of the University to a substantial extent is dependent upon contributions made to it. It appears that cash donations are received daily. During the twenty-day period from September 1 through September 20, 1971, the University received individual cash gifts totaling \$29,695.83. The cash contributions for the year, from August 30, 1970 to August 28, 1971 exceeded \$500,000. Attorney Taylor's affidavit attaches correspondence passing between him and counsel for the Nationwide Foundation in the early part of 1971, to the effect that the Nationwide Foundation, which formerly had made matching grants to the University, would because of the threatened action, no longer continue their program of matching grants. Affidavits from the ten individual contributors stated that their donations to the University materially depended upon their assurance that the same would be

deductible on their individual income tax returns, and that should the Internal Revenue Service withdraw such assurance of deductibility, their respective contributions would be severely curtailed. The affidavits of the officials of the school substantiate the conclusion that should this financial assistance be curtailed, the University's existence would be jeopardized; and that in an effort to make up for its loss of income received through contributions and to replace the moneys expended in attempting to attain a taxpaying status from a records standpoint (estimated by the accountant Fowler to be between \$80,000 and \$100,000), the University would be forced to revise upward its fees and tuition, with the attendant disruption in the educational programs of its students, and the curtailment of future applications caused by such increases. In addition, the University has a funded indebtedness, as well as an expansion program, which would be placed in jeopardy, and members of its faculty and staff would undoubtedly suffer through the possible loss of current income and retirement programs.

The defendants contend that no irreparable harm would result to the University because of the fact that it could compute and pay its tax and seek refund or otherwise contest the same in either the district court or the tax court. As previously indicated, however, the real harm—the loss of contributions and its attendant consequences—would already have transpired and could not realistically be remedied by this process.

7. The statutory provisions under which plaintiff previously has been granted tax exemption, § 501(c) (3), of the Internal Revenue Code of 1954, provide exemption from taxation for:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the

benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this action. 28 U.S.C. § 1331 et seq.

[3, 4] As previously indicated, the court has concluded that this action is not premature because of a failure, on plaintiff's part, to exhaust available administrative remedies. Further, the court concludes that it is not barred from entertaining jurisdiction of the within action because of defendant's other objections thereto. Defendants contend that plaintiff's action seeks an injunction to avoid the assessment and collection of taxes and is barred by the anti-injunction statute, § 7421(a), and cannot be the subject of a declaratory judgment proceeding, since 28 U.S.C. § 2201 permits such actions except those "with respect to federal taxes"; and, that it is also barred by the principle of sovereign immunity.

Up until now there has been no assessment or even an attempt at assessment of any tax insofar as Bob Jones University is concerned. The defendants admit that assessment procedures would not be commenced until the administrative procedures which they contend are available to the plaintiff have been exhausted; and that no tax would be due if plaintiff's exempt status were then revoked until some time in the calendar year 1972. Technically this suit does not involve an attempt to enjoin the assessment and collection of a tax. Recognizing this, the defendants argue that the word "assessment" includes all acts that are necessarily prerequisite to the actual act of making the assessment, and rely upon *Calkins v.*

Smietanka, 7 Cir., 240 F. 138 (1917); *Campbell v. Guetersloh*, 287 F.2d 878 (5 Cir. 1961); *Wahpeton Professional Services, P. C. v. Kniskern*, 275 F.Supp. 806 (D.C.N.D.1967); *Koin v. Coyle*, 402 F.2d 468 (7 Cir. 1968); *Chester v. Ross*, 231 F.Supp. 23 (N.D.Ga.1964), *aff'd*, 351 F.2d 949 (5 Cir. 1965); *Cooper Agency, Inc. v. McLeod*, 235 F.Supp. 276 (D.C.S.C.1964). In each of these cases, an attempt was made to enjoin an action on the part of the Internal Revenue Service directly involved with either the assessment or collection of a tax. In *Calkins* the injunction sought to prevent the production of records during an audit. In *Campbell* the injunction sought to prevent the Service from determining tax due based upon the "bank deposits" method of reconstruction of income. In *Wahpeton*, the action was brought under the declaratory judgment act seeking a declaration as to whether the alleged taxpayer qualified as a corporation and trust for tax purposes. The *Koin* case involved the attempt to assess wagering taxes and involved evidentiary issues thereabout. And in *Chester* there was similarly involved an attempt to suppress the use of evidence because of an injunction procedure where a tax assessment was directly involved.

The court has considered those cases dismissing actions for want of jurisdiction where the question presented involve the tax exempt status of institutions. *Jolles Foundation, Inc. v. Moysey*, 250 F.2d 166 (2 Cir. 1957); *Kyron Foundation, Inc. v. Dunlap*, 110 F.Supp. 428 (D.D.C.1952). The court is convinced that the principles enunciated in those cases are not applicable nor controlling here. The plaintiff does not ask this court to substitute its judgment for that of a federal officer acting in his official capacity. The gravamen of plaintiff's Complaint is that the defendants are threatening to act outside of their authority to exercise judgment and discretion which are not within the legal limits of their authority in such circumstances, since they are purporting to act beyond the authority granted by the

constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress.

If the question here were the applicability of the threatened action to the plaintiff rather than the validity of the action itself, the court would most probably be persuaded to take a different view. If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the applicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal officer which it would be powerless to do. However, the plaintiff readily concedes that it practices a racial discriminatory admissions policy, placing it squarely in violation of the avowed policy of defendants. Thus, this is not a case where the defendants or the court must decide the question of whether the University has a racially nondiscriminatory admissions policy. Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.

Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm of plaintiff, the 4,500 students who attend the plaintiff University, some 650 faculty and staff members, and of the public which is served by the existence of the University.

The Supreme Court has decided many cases in which it has stated the obvious purpose for which the anti-injunction statute was enacted. In *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 292, the Court said:

The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.

The courts have consistently applied this statute in those cases which do not come within the exception thereto, and have refused to entertain jurisdiction of suits seeking injunctions against the levy, assessment, and collection of federal taxes. Many years after the adoption of the original anti-injunction statute, Congress enacted the declaratory judgment act which taxpayers were quick to utilize to avoid the effects of the anti-injunction act. Congress rightfully put an end to such suits by amending the declaratory judgment act by inserting the phrases "except with respect to Federal taxes," which removed the jurisdiction of federal courts to hear declaratory judgment proceedings with respect to the levying, assessment and collection of federal taxes.

Jurisdiction of suits of the nature of this case has been exercised by the courts for many years. For instance, see *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922) and cases cited therein. In *Hill*, plaintiff sought to enjoin the Commissioner of Internal Revenue from imposing a tax on contracts for the sale of grain for future delivery. The Commissioner moved, as he does in the matter before this court, to dismiss the suit, contending that the action was an attempt to enjoin the collection of a tax, contrary to a predecessor of § 7421(a) of the current Internal Revenue Code. The Supreme Court held that such was not the nature of the action

brought by the plaintiffs in *Hill*. In doing so, the Court said:

It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of Boards of Trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal.

The manifest purpose of the tax is to compel Boards of Trade to comply with regulations, many of which can have no relevancy to the collection of a tax at all.

The act is in essence and on its face a complete regulation of Boards of Trade, with a penalty of 20 cents a bushel on all "futures" to coerce Boards of Trade and their members into compliance.

[5] Likewise the record in this case supports the conclusion that the primary purpose of requiring Bob Jones University to adopt a racial nondiscriminatory admissions policy is not to levy, assess, and collect a tax from the plaintiff, but is being done solely for the purpose of complying with a recently espoused policy of the Internal Revenue Service to require certain private educational and religious institutions to adopt and administer racially nondiscriminatory admissions policies and practices. It is obvious that if the plaintiff will agree to the demands of the defendants and change its admissions policy so as to admit blacks on a nondiscriminatory basis, the tax exempt status held by the plaintiff with the express approval of the defendants for a period in excess of forty years will continue in full force and effect.

The conclusion is inescapable that the primary purpose of the defendants in threatening the revocation of the plaintiff's tax exempt status is not to assess and collect taxes, but to compel, through the use or threat to use, taxing powers to require private educational and religious institutions to comply with certain political or social guidelines with regard to the question of racial integration. As

such, the plaintiff's action should not be barred by 26 U.S.C. § 7421(a), or 28 U.S.C. § 2201. In finding that this case is barred neither by the anti-injunction statute nor provisions of the Declaratory Judgment Act, the court is mindful of the decision in *DeMasters v. Arend*, 313 F.2d 79 (9 Cir. 1963). In *DeMasters*, the taxpayer sought to restrain the Internal Revenue Service from investigating the possible income tax liability for years barred by the statute of limitations in the absence of fraud. There the court said:

If appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the doctrine of sovereign immunity.

In a footnote the Court stated:

We are also satisfied that this taxpayers' suit is neither one for declaratory judgment "with respect to federal taxes" precluded by 28 U.S.C.A. § 2201; nor an action "for the purpose of restraining the assessment or collection of any tax" precluded by 26 U.S.C.A. § 7421(a).

[6, 7] The court also concludes that this action is not barred by the Doctrine of Sovereign Immunity. It has long been recognized that the sovereign cannot act illegally or unconstitutionally and, therefore, if an act or threatened action is unconstitutional or illegal it is not the action of the sovereign and such acts or threatened acts can be enjoined. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882); *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 409 F.2d 718 (2 Cir. 1969). Since the primary thrust of plaintiff's action is that it is seeking to enjoin a threatened illegal and unconstitutional act, it is concluded that the court is not deprived of jurisdiction because of the Doctrine of Sovereign Immunity.

Based on the foregoing the court concludes that defendants' Motion to Dismiss should be denied.

2. Plaintiff's Motion for an injunction *pendente lite* should be granted.

[8] Based on the present record, the court finds that plaintiff has made a *prima facie* showing that the defendants have surpassed, or are in the process of exceeding, their statutory authority as granted to them by the Congress in the Internal Revenue Laws.

In this connection, the court is not unaware of the three-judge district court decision in *Green v. Kennedy et al.*, 309 F.Supp. 1127 (1970). It is concluded that the *Green* case is distinguishable both on its facts and in the legal issues presented therein. In the first place, the plaintiff school here has practiced the admissions policy now in issue for over forty years, whereas, in the *Green* case, the private schools whose tax exempt status was being challenged were only recently established "as an alternative available to white students seeking to avoid desegregated public schools." Then, too, the present plaintiff contends, and has introduced substantial evidence in support of such proposition, that its admission policy is, and always has been, based on religious considerations.⁵ The *Green* court was not confronted with such a substantial conflict between constitutional rights—that is, the right of religious organization to practice its teachings without being treated any differently than any other religious group by the United States government versus the right not to be discriminated against on the basis of race—when it reached its decision. In point of fact, the *Green* court not only was not faced with this issue, but also was without the benefit of the reasoning and holding contained in the more recent case of *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); the case plaintiff relies upon so heavily in support of its interpretation of the aforesaid con-

stitutional right it advances. In the *Walz* case the Supreme Court held that "for the government, to exercise at the very least this kind of benevolent neutrality, [tax exemption,] toward churches and religious exercises generally so long as none was favored over others and none suffered interference" was not a violation of the religious clauses of the First Amendment. In this context, and for the sole purpose of considering this request for temporary relief, this court concludes that the rationale and the holding of the *Green* case are not controlling herein.

Another reason why the court is disposed to grant plaintiff's Motion is that upon balancing the equities and weighing relative hardships that would be incurred by the respective parties if the relief asked for is granted or denied, it concludes that the equities lie in favor of granting the temporary injunction. In the event temporary injunctive relief is denied to the plaintiff, and should it prevail after a trial on the merits it could not, in all likelihood, recover the loss of contributions which it probably would experience because of the threat of loss of its tax-exempt status. On the other hand, should the defendants prevail in the trial they would not have incurred any substantial monetary expense, loss, or other irreparable harm, since any taxes that plaintiff might then be required to pay would not be due and owing until April 15, 1972, a date long after a decision on the merits should have been reached; and they would have been enjoined from revoking plaintiff's tax-exempt status only for a short period of time. Moreover, as the court previously observed, the revocation of plaintiff's tax-exempt status is not being attempted for the purpose of raising additional tax revenues, but for the purpose of compelling plaintiff to adopt a non-discriminatory admission policy. Whether or not the defendants will ultimately achieve this goal is not a question for this court to answer, but in

5. This is but one of several constitutional rights that plaintiff contends will be violated if its tax exempt status is revoked.

view of the aforesaid substantial clash of constitutional guaranties involved in this controversy this court does believe, and accordingly decides, that if in fact the outcome of this litigation will have any effect on the attainment of this goal such a result should come only after a trial on the merits has been had. It is, therefore,

Ordered that the defendants' Motion to Dismiss be, and it hereby is denied; and, it is further

Ordered that the defendants, their agents, servants, deputies, employees, successors in office and all persons in active concert with them, are hereby enjoined *pendente lite* from revoking or threatening to revoke the tax exempt status of plaintiff, and further enjoined *pendente lite* from withdrawing advanced assurance deductibility of contributions solely because of the admissions policy of plaintiff pending a final hearing and determination of this cause on the merits.

Appendix C

Notice: This opinion is subject to normal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS For the District of Columbia Circuit

NO. 71-1299

"AMERICANS UNITED" INC., et al, *Appellants*

v.

JOHNNIE M. WALTERS, *Commissioner of Internal Revenue*

Appeal from the United States District Court
for the District of Columbia

Decided January 11, 1973

Mr. Alan Morrison, with whom *Mr. Franklin C. Salisbury* was on the brief, for appellants.

Mr. Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice, with whom *Messrs. Thomas A. Flannery*, United States Attorney at the time the brief was filed, and *Grant W. Wiprud*, Attorney, Tax Division, Department of Justice, were on the brief, for appellee.

Before: Fahy, *Senior Circuit Judge*, Tamm and Wilkey, *Circuit Judges*.

Opinion by *Circuit Judge Tamm*.

Concurring Opinion by *Circuit Judge Wilkey* at p. 24.

Tamm, Circuit Judge: This case comes to us on appeal from an order in the district court denying appellants' (Plaintiffs below) petition to convene a three-judge district court pursuant to the provisions of 28 U.S.C. § 2282 (1970), and granting appellee's motion to dismiss. For the reasons stated at length below we affirm the action of the district court as it pertained to the individual appellants involved, but as to the corporate appellant reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Appellant Americans United, incorporated as "Protestants and Other Americans for Separation of Church and State," is organized under the laws of the District of Columbia and is a nonprofit educational corporation. On July 3, 1950, the Commissioner of Internal Revenue issued a ruling that Americans United qualified as tax exempt under § 101(6) of the Internal Revenue Code of 1939, the predecessor to § 501(c)(3) of the 1954 Code.¹ Consequently, for a period of nearly twenty years not only was Americans United free from taxation upon its income, but also contributors to the corporation were entitled to the deductions provided under § 170 of the 1954 Code (§ 23(q) of the 1939 Code).² On April 25,

¹26 U.S.C. § 501(c)(3) (1970):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

²Organizations which have secured rulings that they are tax exempt under § 501(c)(3) are described in I.R.S. Publication No.

1969, a letter ruling from the Service revoked the 1950 ruling, holding that Americans United had violated §§ 170(c)(2)(D) and 501(c)(3) of the Code by devoting a substantial part of its activities to attempts to influence legislation. More particularly, the letter ruling stated that although part of Americans United's activities could be classified as "educational" or "charitable" within the meaning of § 501(c)(3) of the Code, it was, nonetheless, an "active advocate of a political doctrine." The majority of the corporation's activities were held to be in furtherance of the following goals: "the mobilization of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all "patriotic" citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools."

While Americans United still retained a tax exempt status as an organization described in § 501(c)(4) of the Code,³ the removal of its § 501(c)(3) exemption allegedly proved to be most damaging. Americans United states that its resulting removal from the list of § 170 corporations to whom tax free contributions could be made dried up its well of contributory resources to such an extent that it operated at a deficit for the

78, *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*. The requirements for §§ 501(c)(3) and 170(c)(2) are nearly identical in every respect.

³26 U.S.C. § 501(c)(4) (1970):

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

first time in its history during fiscal year 1970. Consequently, on July 30, 1970, this action was commenced in the United States District Court for the District of Columbia. Two individual plaintiffs, Archer and Lowell, apparently suing as taxpayers who intended in the future to contribute to Americans United, joined with Americans United in bringing the class action.

The amended complaint in the district court averred violations of various first and fifth amendment liberties and guarantees: (1) §§ 170 and 501, and the action of the Commissioner in giving force and effect thereto, were unconstitutional and void insofar as they denied § 501(c)(3) status to the corporate appellant by reason of its exercise of first amendment rights, and likewise denied individual appellants the privilege of deducting the contributions used as a vehicle to exercise their first amendment rights. (2) Since what was a "substantial part" in the case of Americans United was not a "substantial part" in the case of other, larger organizations opposed to appellants' viewpoint, the change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and influencing legislation was an unreasonable classification against Americans United, and by reason thereof Americans United and other organizations similarly situated were being discriminated against and denied equal protection of the laws in violation of the fifth amendment of the United States Constitution. (3) Appellants claimed that their tax dollars were being used by reason of §§ 170 and 501 in a manner that aided and strengthened churches whose size permitted their influencing of legislation to be "relatively less substantial than that of the corporate [appellant]," and that appellee's actions in enforcement thereof constituted violations of the establishment and free exercise clauses of the first amendment. (4) The exemption clause of § 501(c)(3) amounted to an invalid delegation of legislative power "in that the statutory standards of 'substantiality' and 'propaganda' [were] lacking in specificity for the carrying out of the purpose of Section 501(c)(3)." (5)

Finally, the defendant acted arbitrarily and capriciously in abuse of his discretion in applying, in this situation, the "substantial influencing" clause of the statutory exemption of § 501(c)(3).

Appellants' complaint founded jurisdiction for the action upon 28 U.S.C. § 1331 (1970) (civil action where amount in controversy exceeds \$10,000 and which arises under the Constitution and laws of the United States), 28 U.S.C. § 1340 (1970) (whereby jurisdiction is bestowed in the federal district court in any civil action arising under an Act of Congress providing for internal revenue), and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970) (making final agency action subject to judicial review). Appellants also sought the convention of a three-judge district court pursuant to 28 U.S.C. §§ 2282⁴ and 2284 (1970), and requested the following relief: (1) Declaratory judgment that the "exemption clauses of Section 501(c)(3) [were] separable from the remainder of the section and [were] null and void" as unconstitutional under the first and fifth amendments, and as an invalid delegation of legislative power.⁵ (2) Judgment "re-

⁴28 U.S.C. § 2282 (1970):

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

⁵In this manner the appellants seek to continue the viability of § 501(c)(3) without the challenged "substantial part" exception to the exemption. As the Court of Appeals for the Tenth Circuit has recently stated: "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute." *Moritz v. Commissioner*, No. 71-1127 (November 27, 1972), at p. 8. Cf. *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring), and *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942).

quiring" the appellee to "reevaluate" corporate appellant as a § 501(c)(3) charitable corporation and to reinstate corporate appellant on the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, if found to be eligible under the newly constituted § 501(c)(3). (3) Judgment restraining the appellee from enforcing §§ 170 (c) and 501(c)(3) so as to deprive the individual appellants "of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections." (4) Judgment that appellee acted in an arbitrary and capricious manner in changing the status of corporate appellant. (5) In the alternative, judgment requiring appellee to reopen the revocation proceedings and reevaluate the corporate appellant "in the light of the final decision in this case."

Appellee filed a motion to dismiss, based essentially on 28 U.S.C. § 2201 (1970),⁶ which prohibits declaratory judgments "with respect to Federal taxes," and 26 U.S.C. § 7421 (a) (1970),⁷ which prohibits suits "for the purpose of restraining the assessments or collection of any tax." The trial court denied appellants' petition to convene a three-judge court, finding that no substantial constitutional question was raised,

⁶28 U.S.C. § 2201 (1970):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

⁷26 U.S.C. § 7421(a) (1970):

Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions provided are not applicable to this case.

and granted appellee's motion to dismiss, citing *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963).

Alleging error in both aspects of the trial court's order, appellants bring this appeal. Contending that no taxes have been assessed or collected, that this is a civil rights rather than tax case, and that they have no other adequate remedy, appellants maintain that the provisions of 26 U.S.C. § 7421(a) (1970) and 28 U.S.C. § 2201 (1970) cannot be used to prohibit the declaratory and injunctive relief sought. They further contend that they have raised substantial constitutional questions meriting the invoking of a three-judge court under the standards established in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). Appellee's posture on appeal is somewhat different, of course, and in addition to the grounds listed by the trial judge for dismissing the action he relies upon the doctrine of governmental immunity, claiming this to be an unconsented suit against the United States. *Louisiana v. McAdoo*, 234 U.S. 627 (1914).

II. JURISDICTION

1. Introduction

The statutes providing for three-judge "constitutional" courts, adopted to avoid impolitic action on the part of lone federal district judges in matters of broad regulatory scope, are procedural rather than substantively jurisdictional in nature. A complaint which raises substantial constitutional questions and otherwise meets the requirements of § 2282 can and should be dismissed if independent district court jurisdiction is found wanting. "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District court has jurisdiction." *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). This court has held that a dismissal for want of jurisdiction is properly a matter for a single district judge without considering the question of convening a three-judge court. *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960). *Accord*, *Nation-*

al Council on the facts of Overpopulation v. Caplin, 224 F. Supp. 313 (D.D.C. 1963). The first order of business for the single district judge is simply put (although, as here, not so simply decided): Does the district court have jurisdiction even to consider the applicability of a three-judge panel, or are the plaintiffs out of court for lack of subject matter jurisdiction?

The anti-injunction statute (26 U.S.C. § 7421 (1970)) by its terms denies jurisdiction to "any court" in actions seeking to enjoin the assessment or collection of taxes. If such a statute is applicable here the appellants cannot be afforded the relief requested, regardless of the substantiality of the constitutional questions raised. See, e. g., *Harvey v. Early*, 160 F.2d 836 (4th Cir. 1947).

Although its legislative history may be "shrouded in darkness,"^{*} the *raison d'être* of § 7421(a) was illuminated by Chief Justice Warren in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. *In this manner the United States is assured of prompt collection of its lawful revenue.* (Emphasis added, footnote omitted.)

See also *State Railroad Tax Cases*, 92 U.S. 575, 613-14 (1875). Section 7421(a) was thus born of administrative and governmental necessity, used to prevent intermeddling in the tax collection process. An offspring of the equity rule that a suit to enjoin the collection of taxes was not maintainable unless an adequate remedy at law was lacking, its language is much stronger and more encompassing in scope. Even if it can be shown that irreparable injury will result if the collection is

^{*}See Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 Harv. L. Rev. 109 (1935).

effected, § 7421(a) bars a suit for an injunction in the absence of very special circumstances. See *Enochs, supra*, 370 U.S. at 6.

The history of the Declaratory Judgments Act and § 2201 is somewhat different. When initially promulgated in 1934,⁹ the phrase "except with respect to federal taxes" was absent from § 2201. Consequently, federal taxpayers (innovative as they are) quickly utilized it to obtain declaratory judgments holding various tax statutes unconstitutional, something they were barred from accomplishing under the anti-injunction statute.¹⁰ Congress (innovative as it is) quickly reacted and amended § 2201 to include the contentious phrase.¹¹ The Senate Finance Committee, in reporting out the amended version, stated that the "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress [as represented today by § 7421(a)] with respect to the determination, assessment, and collection of Federal taxes."¹² Literally broader than § 7421(a) in its preclusion of tax oriented remedies, the § 2201 exception has literally been found coterminous with that provided by § 7421(a). *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972). See also *Bullock v. Latham*, 306 F.2d 45 (2d

⁹Act of June 14, 1934, ch. 512, 48 Stat. 955.

¹⁰See, e.g., *Penn v. Glenn*, 10 F.Supp. 483 (W.D. Ky. 1935), *app. dismissed per curiam*, 84 F.2d 1001 (6th Cir. 1936), and *F.G. Vogt & Sons, Inc. v. Rothensies*, 11 F.Supp. 225 (E.D. Pa. 1935). Although both courts refused to grant injunctive relief, they expected the tax collector to "respect the decision." If he did not do so and the taxpayer was forced to sue for a refund, "the trial court would probably be justified in refusing him a certificate of probable cause, and thus he and his bond would be liable for the judgment obtained." 11 F.Supp. at 231. This was a neat circumvention of the anti-injunction statute, but one that Congress did not appreciate.

¹¹Act of August 30, 1935, ch. 829, § 405, 49 Stat. 1027.

¹²S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).

Cir. 1962), and *Tomlinson v. Smith*, 128 F.2d 808 (7th. Cir. 1942). We believe that to be a correct interpretation, one soundly based on the history of the exception and on the paradoxicalness of authorizing injunctive relief while depriving courts the authority to declare the rights of the parties in connection with the injunctive relief. The breadth of the tax exception of § 2201 is co-extensive with the effect of § 7421 (a), and so the applicability of the latter to our situation is determinative of jurisdiction.

2. Individual Appellants

The springboard of the action before us—namely that the removal of Americans United from the status of those corporations to whom tax deductible contributions can be made has wreaked havoc upon its financial stature—is the same for both the individual and corporate appellants. They seek to keep Americans United afloat. However, the posture of the appellants and the effect that the relief sought would have upon them is distinctively different. Stripped to its barest essentials, the individual appellants' relief relates directly to the assessment and collection of taxes. They seek, despite their averments that no taxes have been assessed and that this is a civil rights rather than tax case, to enjoin the appellee from assessing or collecting taxes on those dollars contributed by them to Americans United. In paragraph 3 of the relief portion of appellants' amended complaint this becomes evident:

[Plaintiffs pray that the following relief be granted:] Judgment enjoining defendant Thrower from enforcing Sections 170(c) and 501(c)(3) of Title 26 U.S.C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections.

The allegations that the tax will be assessed and collected in violation of their constitutional rights is to no avail. See *Dodge v. Osborn*, 240 U.S. 118 (1916); *Harvey v. Early*, 160

F.2d 836 (4th Cir. 1947); *Moon v. Freeman*, 245 F. Supp. 837 (E.D. Wash. 1965); *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The allegation that no tax has yet been assessed, and that therefore the action is somehow without § 7421(a), we find to be equally without merit. In the words of Chief Judge Sirica in *National Council, supra*, 224 F.Supp. at 314, "[t]he Court cannot agree that the immunity of a tax assessment from court-imposed restraint has anything to do with the timing of that restraint." Finally, the individual appellants have not shown the high probability of success on the merits that warrants the non-application of § 7421(a) under the standards enunciated in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

[I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case [*Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932)], the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." *Id.*, at 509.

We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim may the suit for an injunction be maintained.

The action brought and the relief sought by the individual appellants directly ranges within the ambit of § 7421(a), and as to them the action of the district court in dismissing the case was correct.

3. Corporate Appellant

Americans United, at the present time exempt from taxation on income by virtue of 26 U.S.C. § 501(c)(4) (1970),

does not seek in this lawsuit to enjoin the assessment or collection of its own taxes. Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954* is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. Appellant, therefore, presented with the dollar dilemma of finding prospective contributors closing their wallets, seeks to have the court restrain the Commissioner from meting § 501(c)(3) and § 170(c) qualifications in the alleged unconstitutional manner. A necessary side effect of any relief, of course, will be to allow contributions which otherwise would be made with after tax dollars to become deductible. Consequently, the appellee alleges that this is in essence a suit to restrain the assessment or collection of a tax and barred by § 7421(a).

McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972), involved a class action brought by a black American denied membership in an Elks Lodge because of his race. The plaintiff sought to enjoin the Secretary of Treasury from granting tax benefits to fraternal and nonprofit organizations which excluded nonwhites from membership. The statutes involved were similar to those in the case before us, granting various exemptions both to the organizations and their contributors. The plaintiff alleged that the statutes were either unconstitutional, unconstitutionally interpreted, or that the benefits granted thereby were in violation of Title VI of the Civil Rights Act of 1964. The defendant moved to dismiss citing §§ 2201 and 7421(a), but a three-judge district court denied the motion. Chief Judge Bazelon, writing for the court stated:

Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount

of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable." In the present case, the central purpose is clearly inapplicable. It follows that neither § 7421(a) nor the exception to the Declaratory Judgment Act prohibits his suit.

Id. at 453-54 (footnotes omitted).

A case from the opposite side of the restraint coin, where in the Commissioner threatened to remove the tax exempt status of an organization because of racially discriminatory policies, is *Bob Jones University v. Connally*, 341 F.Supp. 277 (D.S.C. 1971). Fearing that a drop in its level of contributions would cause irreparable harm, the University sought a preliminary injunction restraining the Commissioner from removing its § 501(c)(3) qualification. Faced with identical §§ 2201 and 7421(a) arguments, the district judge granted the injunction. The court found that the gravamen of the plaintiff's complaint was not to ask the court to substitute its views for that of the Commissioner, *see Jolles Foundation, Inc. v. Moysey*, 250 F.2d 166 (2d Cir. 1957), but rather to prevent the Commissioner from acting "beyond the authority granted by the constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress." 341 F.Supp. at 282-83. The court went on to state:

If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the ap-

plicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal office which it would be powerless to do Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.

Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm

Id. at 283.

Here, as in *Bob Jones*, the essence of appellants' attack is not against the applicability of a test or their ability to qualify under presently existing standards. As the appellee correctly points out in his brief, "[appellants] do not seriously contend that Americans United qualifies under Section 501(c) (3) as written. Rather, they contend that the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional, and they seek a declaratory judgment to that effect."

Appellee principally relies upon *Jolles Foundations, Inc. v. Moysey, supra*. Although there is language in *Jolles* regarding § 2201 we believe it to be distinguishable and not persuasive. In *Jolles* the appellant alleged that the Commissioner erred in his determination of its tax exempt qualification, and brought an action which the court correctly viewed as in the nature of mandamus "against the Commissioner to compel him to reverse his position based upon the activities of the Foundation

already held not to come within the exception" 250 F.2d at 169. We submit that the *Jolles* case did not involve the alleged unconstitutionality of a taxing statute, but a challenge respecting the judgment of the Commissioner, and manifestly "the court cannot presume to speak for the Commissioner or take over his duty to pass upon the tax status of organizations applying for exemption." *Id.*

Here, as in *McGlotten* and *Bob Jones*, no tax has been or will be assessed against the corporate appellant. The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation. The corporation, alleging constitutional violations of an identical nature to that of the individual appellants, irreparable injury, and an inadequate legal remedy,¹⁸ does so in a posture removed from a restraint on assessment or collection. We find, as did the courts in *Bob Jones*, *McGlotten*, and im-

¹⁸Since Americans United qualifies as a tax exempt organization pursuant to §501(c)(4) of the Code, the normal avenue of challenge, tax refund litigation, is not available. Appellee in his Supplemental Memorandum and at oral presentation for the first time suggested two additional "adequate" legal remedies available to the appellant corporation. These are the federal social security and unemployment tax refund litigations, since § 501(c)(3) organizations are exempt from both taxes while § 501(c)(4) organizations are exempt from neither.

Appellant points out that although not required to pay social security taxes while exempt under § 501(c)(3), it elected to do so. A termination of such an election requires two years advance notice and cannot be made if the election has been in effect more than eight years, as it was here. Moreover, under 26 U.S.C. § 3121(k)(3) (1970), an organization which once terminates its election to pay those taxes voluntarily cannot renew the election. Although the unemployment tax refund litigation is not fraught with perils of equal magnitude, it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action, and relief sought as to hardly be considered adequate.

pliedly the court in *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), on permanent injunction, 330 F.Supp. 1150 (D.D.C. 1971), *aff'd per curiam*, 404 U.S. 997 (1971),¹⁴ that it would be an all too encompassing interpretation of § 7421(a) to consider it as precluding a suit of this nature, and refuse to so hold.¹⁵

We do not adopt the doctrine that § 7421(a) is inapplicable so long as a party does not seek to restrain the collection or

¹⁴*Green* involved a class action brought by black students and their parents to enjoin the Secretary of Treasury from granting tax exempt status to private schools discriminating against blacks. A three-judge district court was convened and, Judge Leventhal writing, determined that the Internal Revenue Code could not be interpreted as granting a tax exempt status to such organizations. Although faced with governmental insistence that the relief sought was barred by §§ 2201 and 7421(a), the court did not address the problem but granted the injunctive relief. The case was affirmed *per curiam* and without opinion by the Supreme Court, but as by that time the Commissioner had "voluntarily" altered the rules to comply with the decision, and the government did not press the appeal, the precise force and effect of the affirmance is questionable.

¹⁵The ultimate effect of the *Green* and *McGlotten* litigations was to increase the tax revenue of the United States, while at least theoretically the effect of *Bob Jones* and the case at hand is to decrease the tax revenue. We do not believe, and appellee has in fact agreed, that such a fact is of distinguishable merit. It is untenable that a party seeking to have an entire section declared unconstitutional, thus removing the exemption and theoretically increasing the tax revenue, should be treated differently from one seeking to remedy the discriminatory underinclusion by striking the unconstitutional clause, and thus theoretically decreasing the tax revenue.

In reaching our conclusion regarding the applicability of § 7421(a) we have considered, and found unpersuasive, the decisions in Liberty Amendment Committee of the U.S.A. v. United States, Civ. No. 70-721-HP (C.D. Cal June 19, 1970), *aff'd per curiam*, No. 26,507 (9th Cir. July 7, 1972), and Crenshaw County Private School Foundation v. Connally, 343 F.Supp. 495 (M.D. Ala. 1972).

assessment of its own taxes. Our holding is much narrower. In those situations where a non-taxpayer sues in the stead of the taxpayer,¹⁶ e.g., the shareholder suits brought on behalf of a reluctant corporation, *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 464 (1903), cf., *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937), or where the tax itself directly operates to place a financial burden upon the taxpayer, e.g., where the valuation of an estate for estate tax purposes would affect the tax liability of a non-taxpayer at a future date, *West Chester Feed & Supply Co. v. Erwin*, 438 F.2d 929 (6th Cir. 1971), when a tax levied upon processing oil would directly affect one about to enter the processing business, *Gardner v. Helvering*, 88 F.2d 746 (D.C. Cir. 1936), *cert denied*, 301 U.S. 684 (1937), *au fond* it is a suit to restrain the collection or assessment of a tax "indirectly" levied upon the plaintiff, and within the purpose and proscription of § 7421(a).

What we have then is a hybrid sort of fellow. The challenge upon which we reverse runs not to the exercise of discretion or the everyday working affairs of the Commission, something we feel history and good sense implore us to leave alone, nor is it concerned with taxes levied either directly or "indirectly" upon the corporate appellant, something which § 7421(a) mandates us to leave alone.¹⁷ Finally, an alternate

¹⁶Arguably Americans United's purpose could be that of "representing" its remaining contributors who now face the assessment of taxes on their contributed dollars—a sort of "end run" maneuver to avoid the proscriptions of § 7421(a) that we have found to apply to suits brought by those contributors—but we do not believe such to be a realistic appraisal of the situation. Americans United is concerned about its own preservation which is threatened not by the indirect burden of the tax upon them, but by the "unconstitutional" action of the Commissioner resulting in the driving of prospective contributors to other "charities."

¹⁷Standing to sue and ripeness problems, neither of which we find to preclude the lawsuit before us, could also work to prevent other litigation which arguably would be without the scope of §§ 2201 and 7421(a).

legal remedy in the form of adequate refund litigation is unavailable. The lack of a meaningful alternate form of relief is important herein for two reasons: first, its absence solidifies our belief that the situation *sub judice* is without the purpose and expected scope of § 7421(a), and second, its absence renders equitable relief most appropriate. We suspect that the birthrate of such a hybrid will be so low that the proverbial "flood gates" to judicial review of Internal Revenue Service action will remain closed.

4. Sovereign Immunity

Appellee, relying chiefly upon *Louisiana v. McAdoo*, 234 U.S. 627 (1914), urges the court to recognize this suit as one against the United States to which consent has not been given, and hence barred by the doctrine of sovereign immunity. We feel that the appellee has failed to recognize this suit as rightly falling within the exceptions to the doctrine as reiterated by the Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 622 (1963). Those exceptions relate to (1) actions by officers beyond their statutory powers, and (2) actions within the scope of their authority, when the powers themselves or the manner in which they are exercised are constitutionally void. The appellants do not challenge the right of the Commissioner to adopt rules and regulations, but they do challenge his right to enforce a statute which they assert violates various constitutional liberties. This clearly falls within the "exception" almost as broad as the "rule," that "sovereign immunity does not prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution."¹⁸

¹⁸K. Davis, *Administrative Law Treatise* 522 (1958). Professor Davis treats *Ex Parte Young*, 209 U.S. 123 (1908) as the "foundation case" for such a rule:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case

III. SUBSTANTIAL CONSTITUTIONAL QUESTION

The single district court judge below denied appellants' motion to convene a three-judge panel pursuant to 28 U.S.C. § 2282 (1970), for the stated reason that the challenge raised no substantial constitutional questions. We reverse and remand with respect to the only remaining appellant in this litigation, Americans United, with instructions to promptly convene a § 2282 panel.

In *Bulluck v. Washington*, No. 24,862 (D.C. Cir. Jan. 19, 1972), *rehearing en banc*, May 31, 1972, we have recently had an opportunity to restate the scope of a district court's inquiry (and consequently our scope of review) when confronted with an application for a § 2282 panel. The court is limited to questioning (1) whether the constitutional questions raised are substantial, which in turn is limited to a determination of whether they are "obviously without merit" or so clearly unsound by reason of previous decisions of the Supreme Court "as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933); (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case presented otherwise comes within the requirements of the three-judge panel. *Idlewild Bon Voyage Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

As our discussion of the case to this point has shown, what appellant effectively seeks here is a restraint on the enforcement of the "substantial part" clause of § 501 (c) (3). It accomplishes this by seeking a declaratory judgment that the section is unconstitutional, and by requesting injunctive relief to force the Commissioner to reclassify it and other similarly sit-

stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id., at 159-160. See also *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304-05 (1952).

uated corporations as tax exempt if they are found to qualify. This type of action, affecting legislation of broad regulatory scope and amounting to a restraint on its enforcement as written and interpreted, is within the § 2282 mandate. Satisfied that the other requirements for the three-judge panel are present, and that equitable relief is properly requested, we turn to the substantiality question.

Although as can be seen from our earlier listing¹⁹ appellants originally raised a multitude of possible constitutional violations, at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the "discriminatory" aspects of § 501 (c) (3). Basically, this is that since larger, wealthier organizations can engage in conduct identical to that of appellant without, because of their size, falling within the "substantial part" category of § 501 (c) (3) and thereby losing their precious tax exempt status (and more precious listing among those corporations to whom tax free contributions can be made), § 501 (c) (3) is unconstitutionally discriminatory in violation of the equal protection ramifications of the due process clause of the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).²⁰ We find such a claim, novel as it may be, neither obviously without merit nor foreclosed by previous Supreme Court decisions.

Appellee relies chiefly upon *Cammarano v. United States*, 358 U.S. 498 (1959), but *Cammarano*, while disposing of appellants' claim that first amendment right are violated by the

¹⁹See pp. 4-5, *supra*.

²⁰It is true that in *Helvering v. Lerner Stores Co.*, 314 U.S. 463, 468 (1941), Justice Douglas wrote that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." The great weight of authority today, however, as exemplified by *Bolling*, *Schneider v. Rush*, 377 U.S. 163 (1964), and *Shapiro v. Thompson*, 394 U.S. 618 (1969), is that "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" 377 U.S. at 168.

questioned statute, does not attempt to deal with possible discriminatory conduct. In *Cammarano* liquor dealers had expended funds in advertising campaigns against statutory resolutions in Washington and Arkansas which would have effectively closed their businesses, and sought to deduct their costs as ordinary business expenses. The lower courts ruled that "the payments . . . were 'expended for . . . the . . . defeat of legislation' within the meaning of Treas. Reg. 111, § 29.23(0)-1 and were therefore not deductible as ordinary and necessary business expenses under § 23(a) (1) (A) of the Internal Revenue Code of 1939." *Id.* at 501. The court, per Chief Justice Warren, continued:

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

Id. at 513. Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. This discrimination relates solely to the "size" of the organization, which appellants allege is directly related to its wealth and power structure, and comes into play during and because of the exercise of first amendment protected liberties. By allowing larger, richer organizations more "dollar punch" in terms of "propagandizing" and "influencing legislation" before their respective activities are considered "substantial," the Commissioner is accused of following the mandate of § 501 (c) (3) and treating identical activity differently, solely on the basis of the size, or wealth, of the acting party.

Nearly every jurist and attorney today is aware of the flood of cases before the bench raising important questions, at least in the context of the fourteenth amendment equal pro-

tection clause, concerning the interpretation of "fundamental rights," "suspect categories," and their resultant "compelling state interest test." A case similar to the redoubtable *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), which struck down California's system of public school financing as violative of the fourteenth amendment, and straightforwardly classified both "wealth" and "education" as categories calling for stricter justification in terms of equal protection, is presently submitted before the United States Supreme Court. *San Antonio Independent School District v. Rodriguez*, No. 71-1332 (argued 10/12/71, 41 U.S.L.W. 3197). The Court's decision in that case should prove most instructive in an area of concern before us—"discrimination" of this type as within the "wealth" category, and the status of "wealth" as giving rise to the compelling interest test.

If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment,²¹ and raises questions concerning the directness of its relationship to wealth. We are aware that the various tests of which we speak have arisen in the context of the fourteenth amendment, but find that they are nonetheless relevant to the consideration of whether the government has exercised its taxing powers in such a discriminatory fashion as to violate the due process guaranties of the fifth amendment. This is neither

²¹See dissent of Marshall, J., in *California v. LaRue*, 41 U.S.L.W. 4039, 4048 (December 5, 1972), for discussion of classifications based on speech. See also *Speiser v. Randall*, 357 U.S. 513 (1958), a case which although decided on procedural due process grounds discussed the effect of tax exemptions:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

We want to stress that our opinion is in no way meant to state our views of the merits of this case beyond that required: namely, that the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421 (a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion. The discrimination problem may ultimately prove to be a mirage, or even a muddle, but it certainly is not maggot-pated. The question merits a three-judge panel.

Reversed and remanded for further proceedings consistent with this opinion.

Wilkey, *Circuit Judge*, concurring: I concur unreservedly in Judge Tamm's opinion for the court, all the more willingly because his opinion is a model of lucidity in a field of law — taxation — in which that quality is as rarely found in either judicial decisions or legislation as sunlight on the dark side of the moon.

Since we have decided no issue on the merits, except that the constitutional issues are sufficiently serious to require decision by a three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court which was not briefed by the parties and is not dealt with by our court's opinion.

As I see it, the basis of our decision here is that there is a substantial constitutional question because the challenged tax provision discriminates on the basis of wealth (size), and because the Supreme Court is currently considering cases which may say that such distinctions need to be closely analyzed. Although other statutes are relevant, the vital statute at issue is 26 U.S.C. § 501 (c) (3) (1970), quoted in footnote one of the court's opinion. Making a careful analysis of this statute, the

first part states why tax exemption is granted — and that relates to the *purpose* of the organization. Thereafter are listed several factors which will nullify the tax-exempt status granted by the first part of § 501(c)(3). One of the *disqualifications* for tax-exempt status is expressed in the phrase, “. . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . .”

And this disqualification phrase is what this case is all about. 26 U.S.C. § 501 (c) (3) *first* ties tax status to the *purpose* of the organization—and the “no substantial . . . influence legislation” disqualification test (like the disqualification reference to private earnings or political campaigns) *is aimed at assuring some purity in that purpose*.

It is arguable that a small organization that spends almost all of its funds lobbying is not organized or conducted for the same purpose as a large organization, which may spend quantitatively as much, but which proportionately devotes most of its activities to unquestionably exempt purposes. If we make an analysis by following the impact of the donor's dollar, a gift to “Americans United” has “more punch” on the legislative front than a gift to a large church organization which spends only 1% of its income on lobbying activities.

In that sense, the large organization is not engaged in what can reasonably be called “identical conduct.” The statute does not give any greater privilege of speech to large organizations—other than the greater amount of impact any group can have if it raises more money. Rather, the interpretation of equal protection sought by “Americans United” would give a greater right of speech—by emasculating the “purpose” rationale of § 501 (c) (3) — to small organizations. We cannot ignore the “purpose” rationale, because *purpose* is the *only* ground for tax exemption under § 501 (c) (3).

Furthermore, if the larger groups are seen as engaged in “identical conduct”—what is to be the bench mark? If the purpose of the tax statute is to be preserved at all, then the large church organizations probably must hold to devoting a small percentage of their resources to lobbying. Is that *quantitative*

amount then to guide—so that a small organization, with total funds amounting only to the tiny percentage which the large organization devotes to this purpose, could devote 100% of its funds to lobbying and still be exempt?

In short, it is certainly arguable that small groups are not being treated differently by § 501 (c) (3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation.

I have raised the issue above by stating only one side of the argument. There are, of course, counterarguments.¹ We are not here deciding this or any other issue on the merits, but since neither party has seen fit to bring this issue to the courts' attention, I feel it of sufficient importance to raise it for such consideration as the three-judge court and parties may wish to give it.

¹Some counterarguments may be derived from William G. Halby's article, "Is the Income Tax Unconstitutionally Discriminatory?", 58 A.B.A.J. 1291 (December, 1972). Others may be inspired by the reflection that, if 200 years ago men revolted on the principle that "Taxation without representation is tyranny", then today men may rise in righteous wrath because taxation with representation but beyond human comprehension is even worse.

No. 72-1470

FILED

JUN 25 1973

MICHAEL DOBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

BOB JONES UNIVERSITY, PETITIONER

v.

**GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF
THE UNITED STATES, AND DONALD C. ALEXANDER,
COMMISSIONER OF INTERNAL REVENUE**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

MEMORANDUM FOR THE RESPONDENTS

**ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1470

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MEMORANDUM FOR THE RESPONDENTS

Petitioner is an eleemosynary religious organization which has chosen the field of education, principally at the college level, as the vehicle for teaching and propagating its religious beliefs. (Pet. App. A-14; R. 32-35).¹

Petitioner and its predecessor have enjoyed tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and its 1939 Code predecessor since at least 1942, during which time there has been no significant change in petitioner's principles or practices. (Pet. App. A-15.) In 1970, the Internal Revenue Service announced that it would no longer allow tax-

¹ "R." references are to the record appendix filed in the court of appeals.

exempt status under Section 501(c)(3) to private schools having racially discriminatory admissions policies, nor would it treat gifts to such schools as tax deductible charitable contributions under Section 170 (c)(2) of the Code. The Service also announced that, although the nondiscrimination requirement would not affect a school's admissions policies which had no relation to race, the requirement would prohibit allowance of the tax benefits to church-related schools which discriminated on the basis of race. (R. 60-62.)

In November 1970, the Internal Revenue Service addressed a letter to each private school in the United States (including petitioner) which had an individual tax-exemption ruling, seeking information respecting each school's admissions policy regarding race. Petitioner's response, indicating that it had a racially discriminatory admissions policy, set in motion the administrative process for determining whether its tax exemption and deductibility assurance ruling should be withdrawn. (R. 81-82.) After several conferences with officials of the Internal Revenue Service, but before petitioner had exhausted its administrative remedies for protesting the proposed withdrawal of its ruling and the assessment of taxes, petitioner brought the present suit for an injunction. (R. 80-85.) The complaint alleged that petitioner would sustain irreparable injury if its outstanding ruling recognizing tax exemption and assuring deductibility of contributions were suspended or revoked, since petitioner would lose large amounts of contributions and would incur roughly \$100,000 in accounting expenses in preparation for the assessment of income taxes against it and the contesting of those taxes in litigation. (Pet. App. A-16—A-17.) The suit therefore requested preliminary and injunctive relief on

the ground that the policy of the Internal Revenue Service was unconstitutional and unlawful. (R. 9-13.)

The district court issued a preliminary injunction against the respondent Treasury officials prohibiting them from revoking or threatening to revoke petitioner's existing ruling *pendente lite*. (Pet. App. A-21—A-22.) The court of appeals reversed, holding that the district court had no jurisdiction to hear the suit since the action was actually a suit to restrain tax assessment prohibited by the Anti-Injunction Act (Internal Revenue Code, Sec. 7421(a)). The court acknowledged that petitioner would sustain irreparable injury by reason of a decrease in contributions during the period between suspension or revocation of its advance ruling and the conclusion of a Tax Court or refund action. Nonetheless, the court held that petitioner had not satisfied the second prerequisite for an exception to the Anti-Injunction Act prohibition—that it show that “under no circumstances could the Government ultimately prevail” on the merits “under the most liberal view of the law and the facts.” *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7. (Pet. App. A-3—A-7.) On March 21, 1973, the court of appeals denied petitioner's petition for rehearing *en banc*. (Pet. App. A-10—A-12.) On April 3, 1973, the Chief Justice denied petitioner's Application for a Stay of Mandate.

The instant case raises the same jurisdictional issue as that now before the Court in *Americans United, Inc. v. Walters*, 31 A.F.T.R. 2d 582 (C.A.D.C.), certiorari granted, No. 72-1371, June 4, 1973. In that case, the court of appeals held that the Anti-Injunction Act (26 U.S.C. 7421(a)) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201-2202) did not preclude an injunction suit by a tax-exempt organization to

require the Internal Revenue Service to reinstate its deductibility assurance and tax exemption ruling.

Although the instant case and *Americans United* raise the same basic jurisdictional issue and are in direct conflict,² they involve very different substantive contexts and represent considerably divergent points on the substantive spectrum from which this jurisdictional issue can arise. In *Americans United* the Commissioner determined that the taxpayer's lobbying activities violated the explicit statutory prohibitions set forth in Sections 170(c)(2) and 501(c)(3), and revoked the taxpayer's 501(c)(3) exemption ruling on that basis. Taxpayer's suit for reinstatement of its ruling attacked the constitutionality of that statutory prohibition. In the instant case, the Commissioner revoked petitioner's ruling not on the ground that petitioner had violated any explicit statutory provision relating to religious or educational organizations, but on the ground that an organization which pursues racially discriminatory policies does not conform to the overriding general concept of a "charitable" organization. See *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *per curiam sub nom. Coit v. Green*, 404 U.S. 997. Petitioner attacks the Commissioner's actions on grounds, *inter alia*, that the Internal Revenue Code does not permit denial or revocation of an exemption ruling on a broad public policy

² The Court of Appeals, on rehearing, distinguished this case from *Americans United* on the ground that, since the taxpayer in *Americans United* was still exempt under 501(c)(4), it could not litigate the issue of its own exemption. (Pet. App. A-11.) This analysis erroneously ignores the fact that the taxpayer's loss of its 501(c)(3) exemption in *Americans United* rendered it liable for federal unemployment (FUTA) taxes, and that it can raise the issues it would prematurely assert in a suit for injunction when its liability for FUTA taxes is litigated.

ground not set forth explicitly in the Code itself, and that the specific policy asserted by the Commissioner here violates petitioner's freedom of religion.

As we explained in our petition for certiorari in *Americans United*, this jurisdictional issue is of substantial administrative importance. In addition to the instant case, the issue has been decided in the government's favor in the case of *Crenshaw County Private School Foundation v. Connally*, decided March 14, 1973 (No. 72-2775, C.A. 5), rehearing denied, April 27, 1973; *Jolles Foundation v. Moysey*, 250 F. 2d 166 (C.A. 2); and *Liberty Amendment Committee of the U.S.A. v. United States*, decided June 19, 1970 (C.D. Cal., No. 70-721-HP), affirmed *per curiam*, July 7, 1972 (No. 26,507, C.A. 9), certiorari denied, 409 U.S. 1076.³

We therefore join in urging that the petition be granted for the purpose of resolving the jurisdictional issue whether a taxpayer is barred by the Anti-Injunction and Declaratory Judgment Acts from obtaining injunctive or declaratory relief which would prevent the Commissioner from withdrawing, or would require him to issue or reinstate, a ruling that a taxpayer is exempt under Section 501(c)(3) and eligible for tax-deductible contributions under Code Section 170(c)(2).⁴ If the

³ The opinions of the district court and of the court of appeals are not reported, but are printed as Appendix E to the government's petition for certiorari in *Americans United*.

⁴ Petitioner also seeks certiorari here (Pet. 3) on the substantive issue whether the Commissioner's refusal to allow tax-deductible contributions and tax-exempt status to schools with racially discriminatory admissions and operational policies is contrary to the provisions of the Internal Revenue Code and in violation of the religion clauses of the First Amendment and the due process clause of the Fifth Amendment. If the government prevails on its Anti-Injunction Act argument, the substantive issue need not

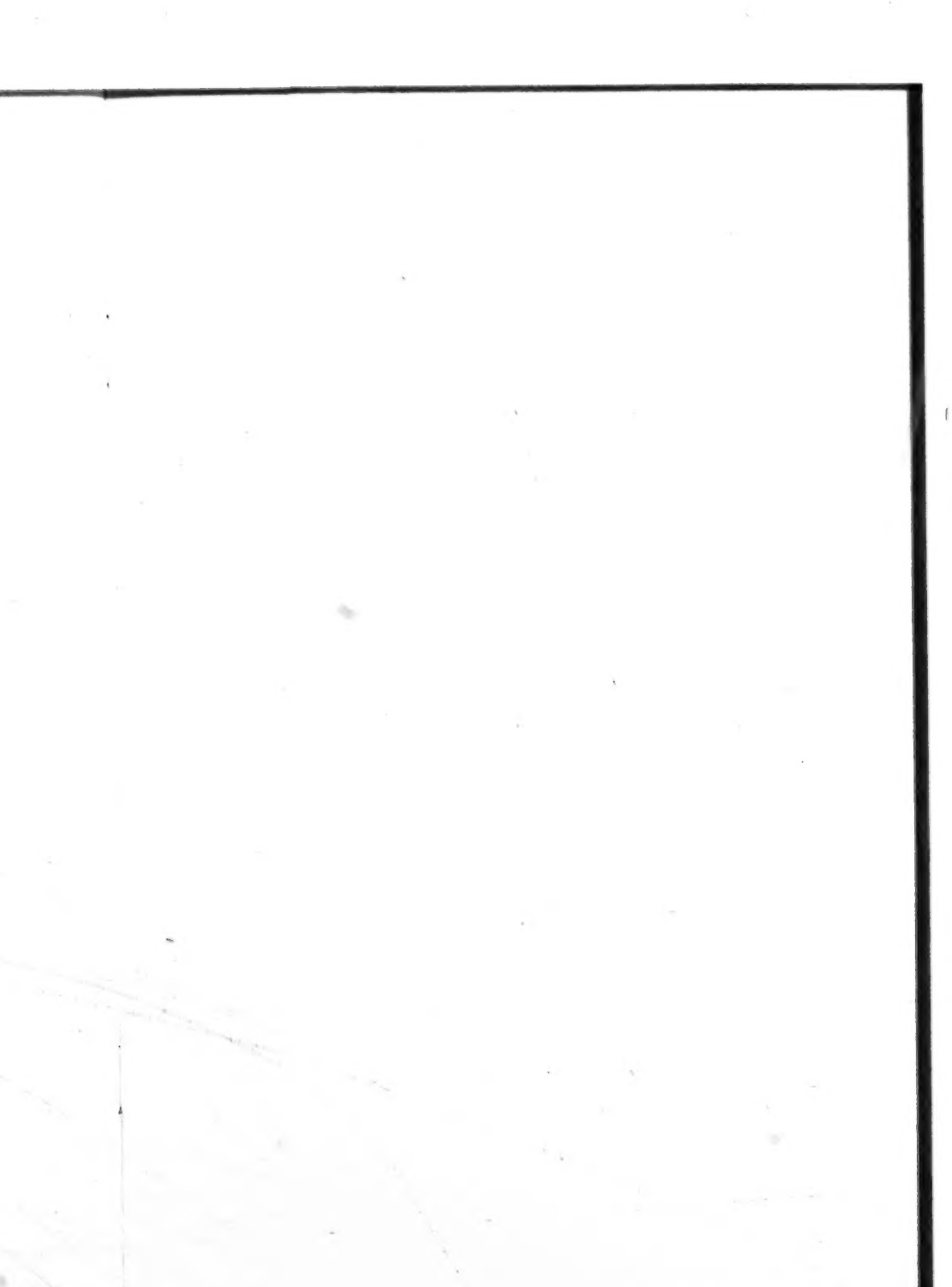
petition is granted, it may be appropriate to set this case for oral argument immediately before or after the argument in *Americans United*, or to consolidate it with that case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE, 1973.

be entirely resolved, since, under the test set forth in *Enochs v. Williams Packing Co.*, *supra*, a decision in the government's favor on the jurisdictional issue will indicate only that petitioner has failed to show that "under no circumstances" could the government prevail on the substantive issue. If the petitioner is to prevail, however, it must show that its racial discrimination policy does not disqualify it from tax exemption as a matter of legal certainty. The substantive issue is, therefore, included in the jurisdictional issue to the extent defined in this memorandum. See Rule 23, 1(c) of the Revised Rules of this Court.



No. 72-1470

SUPREME COURT,
FILE

NOV 23 1973

MICHAEL RODAK, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

BOB JONES UNIVERSITY, PETITIONER,

versus

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF
THE UNITED STATES, AND DONALD C. ALEXANDER,
COMMISSIONER OF INTERNAL REVENUE, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional, Statutory and Rules Provisions Involved	3
Statement	7
Summary of Argument	10

Argument:

- I. Do federal courts have jurisdiction to grant injunctive relief preventing the withdrawal of the tax exempt status of religions and educational organizations? 13

 - A. Does the Anti-Injunction Statute, 26 U. S. C. 7421 or the exception in the Federal Declaratory Judgment Act, 28 U. S. C. 2201, deprive the federal courts of jurisdiction to enjoin the revocation of the tax exempt status of petitioner where (a) the action sought to be enjoined would result in irreparable injury to Petitioner; (b) Petitioner has no remedy at law and (c) Petitioner has asserted substantial statutory and constitutional questions concerning the legality of the threatened revocation? 13
 - B. Is the Anti-Injunction Statute, 26 U. S. C. § 7421, and the exceptions in the Federal Declaratory Judgment Act, 28 U. S. C. § 2201 unconstitutional as applied by the Court of Appeals below in that they would deprive Petitioner of Fifth Amendment due process rights to be heard by an impartial tribunal prior to the infliction of irreparable harm for which there is no remedy at law? 16
 - C. Did the Court of Appeals misapply the exception to the applications of the Anti-Injunction Statute enunciated by this Court in *Enochs v.*

INDEX—Continued

	PAGE
<i>Williams Packing Co.</i> , 370 U. S. 1, and <i>Miller v. Standard Nut Margarine Co.</i> , 284 U. S. 498?	21
D. Does this case involve a suit to restrain the assessment or collection of a tax so as to trigger the provisions of the Anti-Injunction Statute?	27
E. Do federal courts have inherent jurisdiction under the Constitution to grant injunctive relief against Treasury officials where a <i>prima facie</i> showing has been of irreparable injury and of illegal and unconstitutional threatened action?	30
II. Is the revocation of the University's tax exempt status solely because of its religious beliefs as expressed in its admissions policy illegal or unconstitutional?	34
A. Is the threatened revocation of the University's tax exempt status unlawful and contrary to the clear and unambiguous provisions of the Internal Revenue Code?	34
B. Is the threatened revocation of the University's tax exempt status unlawful and beyond the delegated powers of Treasury officials?	42
C. Is the threatened revocation of the University's tax exempt status in violation of the First Amendment to the Constitution in that it would deprive the University of its right to the free exercise of its religious beliefs and would promote, benefit and establish religion?	46
D. Is the threatened revocation of the University's tax exempt status in violation of the Fifth Amendment to the Constitution in that it would deny the University due process and equal protection of the law?	64
Conclusion	67

CITATIONS

Cases:	PAGE
A & N Furniture & Appliances v. United States, 271 F. Supp. 40	43
Abingdon v. Schempp, 374 U. S. 203	46, 50, 65, 66
"Americans United" Inc. v. Walters, 477 F. (2d) 1169	13
Anti-Fascist Committee v. McGrath, 341 U. S. 123	18
Armstrong v. Manzo, 380 U. S. 545	16
Automobile Club of Mich. v. Commissioner of Internal Revenue, 353 U. S. 180	45
Beardsley v. Selectmen of Bridgeport, 53 Conn. 489, 3A. 557 (1885)	40
Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 409 F. (2d) 718	31, 32
Board of Education v. Allen, 392 U. S. 236	50, 66, 67
Boddie v. Connecticut, 401 U. S. 371	16
Bolling v. Sharpe 347 U. S. 497	64
Bond v. Floyd, 385 U. S. 116	48
Broadway Theater League of Lynchburg, Va., Inc. v. United States, 393 F. Supp. 346	38
Cammarano v. United States, 358 U. S. 498	45
Chealtan v. United States, 92 U. S. 85	14
Committee for Public Education and Religious Liberty v. Nyquist, — U. S. —, 93 S. Ct. 2955	50
Commissioners for Special Purposes of Income Tax v. Pemsel, AC 531, 583 (1891)	40, 51
Commissioner of Internal Revenue v. Landers Corp., 210 F. (2d) 188	43
Commissioner of Internal Revenue v. Produce Reporter Company, 207 F. (2d) 586	43
Commissioner of Internal Revenue v. Tellier, 383 U. S. 687	42
Commissioner of Internal Revenue v. Winslow, 113 F. (2d) 418	43
Cooper v. Pate, 382 F. (2d) 518	49
Crenshaw County Private School Foundation v. Connelly, 474 F. (2d) 1185	22

CITATIONS—Continued

Cases:

	PAGE
DeMasters v. Arand, 313 F. (2d) 79	29
Dixon v. U. S., 381 U. S. 68	43
Dows v. Chicago, 11 Wall 108	24
Elfbrandt v. Russell, 384 U. S. 11	47
Enochs v. Williams Packing Co., 370 U. S. 1 .. 2, 10, 13, 21 22, 24, 25, 26, 67	67
Evans v. Newton, 382 U. S. 296	41, 49
Everson v. Board of Education, 330 U. S. 1	50
First Unitarian Church v. County of Los Angeles, 357 U. S. 545	53, 54
Follett v. Town of McCormick, 321 U. S. 573	49, 53
Green v. Connally, 330 F. Supp. 1150 (D. D. C. 1971), aff'd per curiam sub nom. Coit v. Green, 404 U. S. 997	10, 21, 22, 23
Griswold v. Connecticut, 381 U. S. 479	46
Hadnote v. Amos, 394 U. S. 358	27
Hannewinkle v. Georgetown, 15 Wall 547	24
Heiner v. Donnan, 285 U. S. 312	16
Helvering v. Bliss, 293 U. S. 144	39
Helvering v. Davis, 301 U. S. 619	33
Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110	45
Hill v. Wallace, 259 U. S. 44	29
Independent Petroleum Co. v. Fly, 141 F. (2d) 189	39, 44
Jolles Foundation, Inc. v. Moysey, 250 F. (2d) 116	33
Kyron Foundation v. Dunlap, 110 F. Supp. 428	33
Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682	30
Liberty Lobby, Inc. v. Pearson, 390 F. (2d) 489	48
Lincoln Electric Co. Employees' Profit-Sharing Trust v. Commissioner of Internal Revenue, 190 F. (2d) 236 ..	43
Magnano Co. v. Hamilton, 292 U. S. 40	49
Manhattan General Equipment Co. v. Commissioner, 297 U. S. 129	43

CITATIONS—Continued

Cases:

	PAGE
McGlotten v. Connally, 338 F. Supp. 448	13, 22
Miller v. Standard Nut Margarine Co., 284 U. S. 498	2
	10, 21, 22, 24, 25, 27, 39
Moose Lodge No. 107 v. Irvis, 407 U. S. 163	12, 23, 62, 63
C. F. Mueller Co. v. Commissioner of Internal Revenue, 190 F. (2d) 120	39
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306	16
Murdock v. Pennsylvania, 319 U. S. 105	49, 53
NAACP v. Ala., 357 U. S. 449	47, 49
Northern Natural Gas Co. v. O'Malley, 277 F. (2d) 128	43, 44
Petroleum Heat & Power Co., Inc. v. U. S., 405 F. (2d) 1300	45
Pierce v. Hill Military Academy, 268 U. S. 510	46
In Re Estate of Robbins, 21 Cal. Repr. 797, 371 P. (2d) 573	41
Russell v. Allen, 107 U. S. 163	40, 51
Schneider v. Smith, 390 U. S. 17	47
Schneiderman v. U. S., 320 U. S. 118	47
Sherbert v. Verner, 374 U. S. 398	52
Speiser v. Randall, 357 U. S. 513	18, 19, 53, 54
State Railroad Tax Cases, 92 U. S. 575	24
Stevens Bros. Foundation, Inc. v. Commissioner of Internal Revenue, 325 F. (2d) 633	35
Tomlinson v. Smith, 128 F. (2d) 808	13
U. S. v. Correll, 389 U. S. 299	45
U. S. v. 525 Company, 342 F. (2d) 759	45
U. S. v. Korner, 56 F. Supp. 242	48
U. S. v. Robel, 389 U. S. 258	47
U. S. v. Shirah, 253 F. (2d) 798	44
U. S. v. Vuitch, 402 U. S. 62	27
U. S. v. Williams, 341 U. S. 70	47

CITATIONS—Continued

PAGE

Cases:

Walz v. Tax Commission of the City of New York, 397 U. S. 664	12, 23, 50, 51, 57, 65
Ward v. Village of Monroeville, 409 U. S. 57	16, 19, 20
Watts v. U. S., 394 U. S. 705	27
Wisconsin v. Constantineau, 400 U. S. 433	18
Wisconsin v. Yoder, 406 U. S. 205	12, 58, 61
W. Va. State Bd. of Ed. v. Barnette, 319 U. S. 624	48

Constitution and Statutes:

Constitution of the United States:

Article I, Section 1	3
First Amendment ...	3, 19, 29, 46, 47, 49, 50, 53
Fifth Amendment	3, 4, 29, 64

Internal Revenue Code of 1939 (26 U. S. C. 152 ed.):

Section 101(6)	35
----------------------	----

Internal Revenue Code of 1954 (26 U. S. C.):

Section 501	4
Section 501(a)	4, 44
Section 501(c)(3)	4, 29, 34, 35, 44, 45
Section 170 Section 1346, Section 1491 Section 6213	4
Section 7421	5, 13, 15, 16
Section 7421(a)	25, 29
Section 7801	43
Section 7802	43
Section 7805	43

Federal Declaratory Judgment Act, 28 U. S. C.

§ 2201	2, 5, 13, 16
28 U. S. C. § 1254 (1)	1
28 U. S. C. § 1331	5
28 U. S. C. § 1340	5
28 U. S. C. § 1361	5

CITATIONS—Continued

	PAGE
Miscellaneous:	
Bitter & Kaufman: <u>Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code</u> , 82	
Yale L. J. 51	22
Charitable Deductions, Tax Exemption and Segregated Institutions, 23 Syracuse L. Rev. 1189	68
Constitutional Law: Tax Exemption and Religious Freedom, 54 Marquette L. Rev. 385	55
Federal Taxation: Section 7421(a) of Internal Revenue Code Literally Construed to Ban all Suits to Enjoin Assessment or Collection of Taxes, Duke Law Journal Vol. 1963:175	25
Memphis State L. Rev. 3:381 (1972-73)	16
Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518 (1969-70)	20
Restatement (2nd) Trusts:	
Section 368(b)	41
Section 370(a)	40
Section 371	40
Section 371(d); 4A	40
Section 377(c)	41
Scott, <u>The Law of Trusts</u> , §§ 370, 371 (Third Edition, 1967)	40
Treasury Regulations, Section 1.501(c)(3)-1, 26 5, 37	
C. F. R. 1.501(c)(3)	5, 6, 37, 38, 39
1.501(c)(3)-1(d)(3)	39
1.501(c)(3)-1(d)(1)	45
Rule 65, F. R. C. P.	15

No. 72-1470

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

BOB JONES UNIVERSITY, PETITIONER,

versus

**GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF
THE UNITED STATES, AND DONALD C. ALEXANDER,
COMMISSIONER OF INTERNAL REVENUE, RESPONDENTS.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (A., 114)¹ is reported at 341 F. Supp. 277. The opinion of the court of appeals (A., 132) is reported at 472 F. (2d) 903. The opinion of the court of appeals denying rehearing (A., 150) is reported at 476 F. (2d) 259.

JURISDICTION

The opinion of the court of appeals was decided on January 19, 1973. The court of appeals denied rehearing on March 21, 1973. The petition for a writ of certiorari was docketed on April 30, 1973, and granted on October 9, 1973. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

¹ "A." references are to the separately bound joint appendix.

QUESTIONS PRESENTED

I. DO FEDERAL COURTS HAVE JURISDICTION TO GRANT INJUNCTIVE RELIEF PREVENTING THE WITHDRAWAL OF THE TAX EXEMPT STATUS OF RELIGIONS AND EDUCATIONAL ORGANIZATIONS?

A. Does the Anti-Injunction Statute, 26 U. S. C. 7421 or the exception in the Federal Declaratory Judgment Act, 28 U. S. C. 2201, deprive the Federal Courts of jurisdiction to enjoin the revocation of the tax exempt status of Petitioner where (a) the action sought to be enjoined would result in irreparable injury to Petitioner; (b) Petitioner has no remedy at law and (c) Petitioner has asserted substantial statutory and constitutional questions concerning the legality of the threatened revocation?

B. Are the Anti-Injunction Statute, 26 U. S. C. § 7421 and the exceptions in the Federal Declaratory Judgment Act, 28 U. S. C. § 2201 unconstitutional as applied by the Court of Appeals below in that they would deprive Petitioner of Fifth Amendment due process rights to be heard by an impartial tribunal prior to the infliction of irreparable harm for which there is no remedy at law?

C. Did the Court of Appeals misapply the exception to the applications of the Anti-Injunction Statute enunciated by this Court in *Enochs v. Williams Packing Co.*, 370 U. S. 1, and *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498?

D. Does this case involve a suit to restrain the assessment or collection of a tax so as to trigger the provisions of the Anti-Injunction Statute?

E. Do Federal Courts have inherent jurisdiction under the Constitution to grant injunctive relief against treasury officials where a *prima facie* showing has been made of irreparable injury and of illegal and unconstitutional threatened action?

**II. IS THE REVOCATION OF THE UNIVERSITY'S
TAX EXEMPT STATUS SOLELY BECAUSE OF
ITS RELIGIOUS BELIEFS AS EXPRESSED IN
ITS ADMISSIONS POLICY ILLEGAL OR
UNCONSTITUTIONAL?**

A. Is the threatened revocation of the University's tax exempt status unlawful and contrary to the clear and unambiguous provisions of the Internal Revenue Code?

B. Is the threatened revocation of the University's tax exempt status unlawful and beyond the delegated powers of treasury officials?

C. Is the threatened revocation of the University's tax exempt status in violation of the First Amendment to the Constitution in that it would deprive the University of its right to the free exercise of its religious beliefs and would promote, benefit and establish religion?

D. Is the threatened revocation of the University's tax exempt status in violation of the Fifth Amendment to the Constitution in that it would deny the University due process and equal protection of the law?

**CONSTITUTIONAL, STATUTORY AND RULES
PROVISIONS INVOLVED**

Article I, Section 1 of the Constitution of the United States provides in pertinent part as follows:

"All legislative powers herein granted shall be vested in a Congress of the United States. . . ."

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . or the right of the people peacefully to assemble. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

Section 501 of the Internal Revenue Code, 26 U. S. C. § 501 provides in pertinent part as follows:

"(a) Exemption from taxation.—An organization described in sub-section (c) . . . shall be exempt from taxation under this subtitle. . . .

. . .

(c) List of exempt organizations.—The following organizations are referred to in sub-section (a):

. . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, . . . or educational purposes. . . ."

Section 170 of the Internal Revenue Code, 26 U. S. C. § 170 provides in pertinent part as follows:

"(a) Allowance of deduction.—

(1) General Rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

. . .

(c) Charitable Contribution, defined.—

For purposes of this Section, the term 'charitable contribution' means a contribution or gift to or for the use of—

(2) A corporation, trust or community chest, fund, or foundation—

. . .

(B) Organized and operated exclusively for religious, charitable . . . or educational purposes. . . ."

Section 7421 of the Internal Revenue Code, 26 U. S. C. § 7421 provides in pertinent part as follows:

“(a) Tax.— . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is a person against whom such tax was assessed.”

The Federal Declaratory Judgment Act, 28 U. S. C. § 2201, provides in pertinent part as follows:

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

28 U. S. C. § 1331 provides as follows:

“(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and cost, and arises under the Constitution, laws or treaties of the United States.”

28 U. S. C. § 1340 provides in pertinent part as follows:

“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. . . .”

28 U. S. C. § 1361 provides as follows:

“The district courts shall have original jurisdiction of any action in the nature of *mandamus* to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

Internal Revenue Regulation, Section 1.501(c) (3)—1, 26 C. F. R. 1.501(c) (3) provides in pertinent part as follows:

“(d) **Exempt purposes**—(1) **In General.** (i) an organization may be exempt as an organization de-

financed in Section 501(c) (3) if it is organized and operated exclusively for one or more of the following purposes:

(a) religious, . . .

(f) educational, . . .

(3) **Educational defined**—(i) **In General.** The term 'educational' as used in Section 501 (c) (3), relates to—

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities: or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates the particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) **Examples of Educational Organization.** The following are examples of organizations which if they otherwise meet the requirements of this section are educational:

Example (1). An organization such as a primary or secondary school, a college, or a professional or trade school which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on."

STATEMENT

Bob Jones University was organized and continues to exist as a fundamentalistic religious organization which has chosen the field of education as the vehicle through which to teach and promulgate its religious beliefs (A., 9). The University's Charter and Creed reflect its deeply religious nature and purpose:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures; combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; his identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God (A., 15).

The University enrolls 4,500 students at the college level and employs a faculty and staff of 650 (A., 17). It refuses to accept funds or grants from any government, federal, state or local, because it believes such acceptance would cause the surrender of its religious principles and infringe upon its right to operate the school in harmony with such principles (A., 18).

The University's admissions policy has been since its inception and continues to the present to be controlled by its religious beliefs (A., 18). Not everyone is acceptable to the institution as a student. The University's admissions

policy requires careful screening to determine whether or not a prospective student qualifies for admission from the standpoint of the prospect's religious background and beliefs. The faculty is selected under a similarly careful screening process. While at the University, the students and faculty continue under the scrutiny of the University's administration and those no longer conforming to the University's teachings and beliefs are subject to expulsion (A., 17). Campus life is permeated by religious instruction and orientation (A., 17).

All University activities, including classroom instruction, are begun and ended with prayer; all students are required to attend daily chapel services; all students are required to take courses in Religion (A., 17).

As a part of the University's admissions policy and as an expression of its belief that God intended the various races of men to live separate and apart, the University adopted and has maintained throughout its more than 40 years of existence an admissions policy which prohibits admission of blacks.²

During 1970, the Internal Revenue Service advised the University that its tax exempt status and advance assurance of deductibility of contributions to the University would be revoked unless the University compromised its religious beliefs and adopted a nondiscriminatory admissions policy. Efforts to have the government withdraw its threatened action proved useless and the University was informed that the revocation action would take place in view of the University's refusal to accede to the demands to change its admissions policy.

² The University has admitted a married black student (A., 65). This is entirely consistent with its conviction that intermarriage of the races is forbidden by biblical principles. A married black student does not constitute a threat to the basis for the University's beliefs and admissions policy.

If revocation procedures are followed, the first act of the government would be to withdraw and revoke the University's advance assurance of deductibility of contribution. This action would be taken immediately, following which certain administrative procedures would be employed (A., 53-56). The revocation of the advance assurance ruling would cause immediate and irreparable harm to the University, as found by the district court (A., 118) and admitted by the circuit court (A., 136). The record is replete and uncontroverted that contributions from individual donors and matching grants from various foundations are the financial lifeblood of the University and the revocation of the advance assurance ruling would substantially curtail this financial sustenance (A., 65, 66). There is no way this depletion could be restored to the University even though it ultimately prevailed in the courts. It follows as a natural consequence that the financial structure of the University would be seriously jeopardized, but more importantly that its students currently enrolled, in many instances, would have their educational process terminated, interrupted and hindered. Moreover, prospective students would be denied an education of their choosing because of the increased tuition fees necessitated by the depletion of financial resources in the form of contributions. The University's faculty would be similarly financially impaired and undoubtedly many of the faculty members would have to seek other places of employment (A., 10, 11). The effect upon the University, its faculty, its students and prospective students and community would be disastrously and irreparably damaged by the threatened action of the government.

SUMMARY OF ARGUMENT

Exempt organizations such as the University are not the ordinary "taxpayer" from whom injunctive relief has been withheld by the Anti-Injunction Statute. Revocation of the tax exempt status and particularly withdrawal of advanced assurance of deductibility of contributions inevitably results in irreparable, if not fatal, harm to the exempt organization. An adequate judicial remedy is necessary prior to the withdrawal of advanced assurance of deductibility of contributions with its attendant loss of contributions. The Anti-Injunction Statute relied upon by the government is not literally applicable to the University as to date there has been no attempt at the assessment or collection of any tax.

The procedures offered by the government within the Internal Revenue Service hardly constitute a remedy at all. Certainly, the Internal Revenue Service is ill-qualified to act impartially when the very rule it has promulgated is under attack. Furthermore, expertise in the taxing statute is not required to resolve the substantial constitutional questions asserted by the University here. Exempt organizations are entitled to judicial scrutiny before their advanced assurance is withdrawn and their very lifeblood, contributions, is taken away.

The reliance of the Court below upon *Green, infra*, was ill-placed in that it did not consider the far-reaching constitutional questions presented by the University. In particular, reliance upon *Green* in the context of *Nut Margarine, infra*, and *Williams Packing, infra*, places an impossible burden upon an exempt organization. In both *Nut Margarine* and *Williams Packing*, remedies were available to the taxpayer while the exempt organization is afforded no remedy at all. The usual avenues of redress through refund litigation in the district court or a tax court determination

are of little use to an exempt organization suffering from a contribution drought occasioned by withdrawal of advanced assurance.

The case at bar is in essence not a tax case at all. Without expending any sums and without making any tax returns or bookkeeping entries, the University may avoid this controversy entirely. All that is required is the relinquishment of basic religious beliefs and practices long held by the University through a change in its admissions policy and the government will admittedly cease its attempts to tax the University. The exaction demanded by Treasury officials here is only in the guise of a tax.

In cases where fundamental constitutional rights are in jeopardy, federal courts have always been quick to supply the necessary remedies. Jurisdiction in such cases is inherent in the federal courts, for otherwise constitutional guaranties would have little meaning. There is nothing sacrosanct about the taxing laws or the Treasury Department licensing unconstitutional action. Furthermore, the University does not seek to preempt discretionary powers of federal officers. The University attacks not the applicability of the government's position to it, but rather the validity of that position under the laws and Constitution of the United States.

The University has enjoyed tax exempt status since its formation more than forty years ago. During that period neither the religious beliefs and practices of the University nor the Internal Revenue Code have changed. The clear wording of the Internal Revenue Code commands exempt status for the University. Even assuming that the University must be "charitable" as well as "educational" and "religious", it meets that test under traditional and contemporary definitions of charity.

The Commissioner of Internal Revenue has attempted to change the application of clearly worded Internal Revenue Code provisions. The Commissioner is granted power to interpret and enforce Internal Revenue Code provisions; however, he is not delegated authority to change the law. By grafting a requirement of a racially non-discriminatory admissions policy upon requirements for exempt status, the Commissioner is attempting to change law. He attempts this in the face of the constitutional issues raised by the University's religious beliefs and practices.

Taxation of religious belief and expression clearly violates the free exercise provisions of the First Amendment. No violence is done to the First Amendment establishment clause in that the granting of exempt status does not constitute sufficient federal involvement so as to lead to establishment questions. The granting of tax exempt status merely involves the exercise of benevolent neutrality towards religion, *Walz, infra*. The religious beliefs and practices of the University are clearly entitled to constitutional protection. Even religious beliefs and practices which prohibit education itself have been upheld, *Yoder, infra*. Furthermore, purely private discrimination has repeatedly been held by this Court to be constitutionally permissible, *Moose Lodge, infra*.

The taxation attack by Treasury officials is selective as far as religions are concerned. Only those religions believing in Biblical command against the intermarriage of the races and consequently adopting a discriminatory admissions policy are targeted. These religious beliefs and practices are entitled to the same constitutional protection as are all other religious beliefs and practices. A selective attack directed upon the particular religion adhered to by the University denies the University the equal protection

of the laws and raises serious establishment questions as far as other favored religions are concerned.

The University recognizes that its beliefs and practices are not currently in vogue. However, it is the constitutional rights of the minority, particularly the unpopular minority, which urgently require this Court's protection.

ARGUMENT

I. DO FEDERAL COURTS HAVE JURISDICTION TO GRANT INJUNCTIVE RELIEF PREVENTING THE WITHDRAWAL OF THE TAX EXEMPT STATUS OF RELIGIONS AND EDUCATIONAL ORGANIZATIONS?

A. Does the Anti-Injunction Statute, 26 U. S. C. 7421 or the exemption in the Federal Declaratory Judgment Act, 28 U. S. C. 2201, deprive the Federal Courts of jurisdiction to enjoin the revocation of the tax exempt status of petitioner where (a) the action sought to be enjoined would result in irreparable injury to Petitioner: (b) Petitioner has no remedy at law and (c) Petitioner has asserted substantial statutory and constitutional questions concerning the legality of the threatened revocation?

The Anti-Injunction Statute³ was enacted to assure the government of the "prompt collection of its lawful revenues."⁴ In the more usual situation invoking income taxation of individuals and businesses, there is great weight behind withholding the availability of injunctive relief. Petitioner concedes that an attack by one already a taxpayer upon a general taxing statute, e. g. the income tax laws, should be litigated in the tax court or in the district court

³ The Declaratory Judgment Act exception has been held to be co-terminous with that provided by the Anti-Injunction Statute. "*Americans United*" Inc. v. *Walters*, 477 F. (2d) 1169, 1176; *McGlotten v. Connally*, 338 F. Supp. 448; *Tomlinson v. Smith*, 128 F. (2d) 808, 811.

⁴ *Enochs v. Williams Packing Co.*, 370 U. S. 1.

in a refund action. Obviously, an injunction preventing Treasury officials from collecting the income taxes of the United States would severely restrict the orderly functioning of the Federal Government. Furthermore, an aggrieved party in the usual situation would have a remedy at law.

That is not the case where exempt organizations are involved. First, these organizations have no remedy at law insofar as their advanced assurance of deductibility of contributions is concerned. If Petitioner could take advantage of refund or tax court litigation while retaining its advanced assurance of deductibility until a final judicial decision had been obtained, its position would be similar to that of the normal taxpayer. But this cannot be done under present law. Unlike the normal taxpayer seeking judicial redress, the exempt organization suffers an irreparable loss of contributions during the litigation process. Whereas, the individual taxpayer may be made whole, either by a refund, with interest, of tax paid or by a tax court determination, the exempt organization loses either way.

The disputed "tax" where exempt organizations are involved is one which has never before been paid. The United States has not relied upon its collection. The loss of these revenues, even if the government is ultimately successful in litigation, proves no threat to the orderly administration of the tax laws.

In the usual situation the taxpayer has a possibility of succeeding and making himself whole. In any event his remedy has been held to be "adequate".⁵ Here there is no question as to the "adequacy" of remedy. Here there is no remedy at all. Contributions from hundreds or thousands of contributors will be lost or diverted before there is *any*

⁵ *Chealtan v. United States*, 92 U. S. 85 (1875) see also H. R. Rep. No. 179, 68th Congress, 1st Sess. 7 (1924).

possibility of a judicial determination. How can these losses be recovered or even determined with accuracy?⁶

The University does not assert that any claim should be sufficient to trigger the granting of injunctive relief to an exempt organization. Certainly frivolous claims should not automatically invoke an injunction remedy. But in all equity matters the burden has been upon the moving party to establish his entitlement to injunctive relief. United States District Courts do not hand out injunctions upon simple request.⁷ Here substantial statutory and constitutional questions have been presented of sufficient magnitude to prompt the issue of an injunction by the District Judge below and a vigorous dissent in the Court of Appeals. Where non-frivolous claims are presented, the exempt organization is entitled to full judicial review before it is penalized or possibly destroyed.

The Anti-Injunction Statute⁸ refers to restraining the "assessment or collection" of taxes. In the case of an exempt organization as in the instant case, the relief sought does not literally come within the prohibitions. There has been no "assessment". There has been no attempted "collection". Any extension of the Anti-Injunction Statute beyond its literal term is unnecessary and unwarranted in the case of exempt organizations.

⁶ To deny the real and devastating loss, apart from its exact magnitude, would ignore realities.

⁷ See Rule 65 F. R. C. P.

⁸ The Anti-Injunction Statute, 26 U. S. C. § 7421 provides in pertinent part as follows:

"(a) Tax.— . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is a person against whom such tax was assessed."

B. Are the Anti-Injunction Statute, 26 U. S. C. § 7421 and the exceptions in the Federal Declaratory Judgment Act, 28 U. S. C. § 2201 unconstitutional as applied by the Court of Appeals below in that they would deprive Petitioner of Fifth Amendment due process rights to be heard by an impartial tribunal prior to the infliction of irreparable harm for which there is no remedy at law?

It is well settled that due process requirements are applicable to the taxing powers of the Federal Government. *Heiner v. Donnan*, 285 U. S. 312. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313, this court commented that, "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Subsequent cases have reaffirmed this conception of due process. The right to a hearing must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U. S. 545. The hearing must be before an impartial tribunal. *Ward v. Village of Monroeville*, 409 U. S. 57.⁹ Only a countervailing state interest of overriding significance may enable a procedure, otherwise incompatible with due process, to pass constitutional muster. *Boddie v. Connecticut*, 401 U. S. 371, 377.

The decision of the Court of Appeals has the effect of applying the Anti-Injunction Statute to a situation for which the Statute was not designed and in which the policies of the statute do not operate. The inappropriateness of the application of the Anti-Injunction Statute in this context has resulted in the University being denied Due

⁹ See: *Memphis State Law Review* 3:381 (1972-73).

Process of Law without the justification of any Governmental interest of overriding significance.

When the Commissioner of Internal Revenue decides to remove the tax exempt status of an institution, the time for determining the lawfulness of the Commissioner's action is of utmost importance. The initial loss of the University's advanced assurance of deductibility of contribution is the crucial moment in the controversy, for the subsequent injury sustained by the University through its loss of contributions does not accrue to the government in the form of increased revenue.¹⁰ Thus, a successful suit by the University concerning the lawfulness of the government's action, after the University's tax-exempt status has been removed, is completely ineffectual as a remedy for the injury the University has sustained. The Court of Appeals acknowledged the significance of this injury in its decision:

"Of course, the tax on any net income which may be imposed would be recoverable, but we would be naive indeed not to recognize the substantial portion that contributions play in the gross income of any institution of higher learning and the adverse effect on those contributions if their deductibility for income and estate tax purposes of the donors is disallowed. If Jones University is required to litigate its tax-exempt status after that status has been withdrawn, we can predict with confidence that during the period of litigation it will lose gifts and contributions which will never be recoverable even if it is successful in having its tax-exempt status restored" (A., 136).

The Due Process Clause requires that the University be afforded an opportunity to be heard and present a defense before it is made to suffer a grievous, irrevocable loss.

¹⁰ The lost contributions, themselves, may not become available to the government for taxation purposes. The donors will presumably divert their funds to other tax-exempt organizations.

Anti-Fascist Committee v. McGrath, 341 U. S. 123; *Wisconsin v. Constantineau*, 400 U. S. 433.

There is, moreover, no overriding governmental interest which would be furthered by denying the University a judicial hearing before its irreparable injury is sustained. A government claim on a fixed sum of University funds does not arise concomitantly with the removal of the University's tax exempt status. Thus, a delay in determining the controversy until the tax exempt status has been removed does not appreciably expedite the government's collection of revenues from the University. Moreover, the most serious harm to the University is not directly derived from the obligation to pay taxes to the government in the future, but rather from the loss of contributions which affect the University immediately upon loss of its tax-exempt status.

There is, however, a matter of overriding significance favoring a prior judicial hearing for the University in conformity with traditional Due Process principles. The University has raised substantial statutory and constitutional objections to the Commissioner's proposed actions. This Court has voiced its concern that First Amendment guarantees not be subject to infringement through the operation of the tax laws. *Speiser v. Randall*, 357 U. S. 513. This Court commented in *Speiser* that, "... it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech." The Court went on to hold that:

"... when the constitutional right to speak is sought to be deterred by a State's general taxing program, due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a

short-cut procedure which must inevitably result in suppressing protected speech." *Id.* at 528.

In essence, the Commissioner has initiated action against the University because of the University's religious beliefs. The University is, therefore, placed in the dilemma of either abandoning the exercise of certain tenets of its religion and maintaining its tax exempt status; or, holding to its religious beliefs and suffering the ensuing financial catastrophe occasioned by the removal of its tax exemption. In either case the University's constitutional guarantee of the freedom to exercise its religion is severely inhibited. As the Court indicated in *Speiser*, First Amendment rights are of such importance that Due Process requires they remain unencumbered until the lawfulness of the government's action in suppressing them is determined.

It is essential to Due Process that the lawfulness of the government's action be determined before an impartial tribunal. *Ward v. Village of Monroeville*, 409 U. S. 57. In *Ward* the petitioner was compelled to stand trial for traffic offenses before the mayor, who was responsible for village finances and whose Court provided a substantial portion of village funds. This Court held that the petitioner was denied a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause. Furthermore, in countering an argument that any unfairness in the trial could be corrected on appeal and a trial *de novo* in another court, this Court stated:

"This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure to be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial

adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Id.* at 61.

The decision of the Court of Appeals would deprive the University of any meaningful prior hearing. The very agency which is seeking to remove the University's tax exempt status is placed in the position of making the final determination of the merits of the University's objections before the Agency's decision is implemented.

This denial of the Due Process right to an impartial tribunal is rendered even more onerous by the circumstance that the University will sustain an irreparable loss of contributions before it can obtain an impartial adjudication. Thus, this Court's concern for Due Process in the first instance, as expressed in *Ward*, is especially pertinent to the University's situation.

The University is compelled to submit to the Constitutionally infirm administrative procedures of the Internal Revenue Service as the only available method of warding off irreparable injury. *Ward* requires that these administrative procedures meet constitutional standards on their own merits. The deprivation of the University's right to Due Process in this first instance, is not remedied by a procedure which eventually permits an impartial adjudication some time after the most grievous harm has been suffered. In addition to the partisan role of the Commissioner in the controversy, there are certain inherent characteristics of an administrative agency which render the Internal Revenue Service unsuitable for the task of providing the University with a meaningful hearing.¹¹ An administrative

¹¹ Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1969-70). Professor Monaghan remarks on the basic institutional differences between the courts and administrative agencies.

"First, long judicial tenure frees judges, in most cases, from direct political pressures. Judicial insulation encourages impartial decision-making; more importantly, it permits the courts to take the 'long view' of issues. Administrative bodies, particularly at the state level, are rarely so insulated; indeed they are often seen primarily

agency functions as an expert in a restricted area of the law, a circumstance which creates in the agency a narrow view of matters coming before it. The courts, however, do not suffer from this administrative tunnel vision and can view an issue from a broad perspective.

The University has made substantial statutory and constitutional objections to the Commissioner's decision to remove the University's tax exempt status. Issues have been raised which are outside the field of the Commissioner's expertise, and which, for their resolution, require a broad view of constitutional guarantees. The University's Due Process right to a timely, impartial and meaningful determination of these matters can only be obtained through a judicial hearing prior to the implementation of the Commissioner's decision.

While the Internal Revenue Service functions as an expert in matters of taxation, the issues involved in this controversy range far beyond the Service's field of expertise. Common law notions of charity and the constitutional guarantees of Due Process and free exercise of Religion are matters concerning which the Commissioner possesses no specialized knowledge.

C. Did the Court of Appeals misapply the exception to the application of the Anti-Injunction Statute enunciated by this Court in *Enochs v. Williams Packing Co.*, 370 U. S. 1 and *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498?

The Court of Appeals, although declining to rule on the ultimate merits of the University's claim, relied upon *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd*

as political organs. Second, the role of the administrator is not that of the impartial adjudicator but that of the expert—a role which necessarily gives an administrative agency a narrow and restricted viewpoint." *Id.* at 522.

per curiam sub nom. Coit v. Green, 404 U. S. 997¹² to conclude that the "under no circumstance" test of *Williams Packing* had not been met. The University submits that the Court of Appeals' reliance upon *Green* was misplaced in the *Williams Packing* and *Nut Margarine* context and that, at least the court should have considered the statutory and constitutional argument advanced by the University.

In *Green*, plaintiffs, Negro citizens of Mississippi, brought an action against treasury officials seeking an injunction to prevent the granting of tax exempt status to "segregated academies in Mississippi." *Green* was simply another legal battle by the proponents of racial integration against efforts of the State of Mississippi to avoid the effects of decisions of this court striking down segregation in public schools. The District Court enjoined treasury officials from granting tax exempt status to these segregated Mississippi private schools.

Green was decided in a doubtful adversary context.¹³ Originally treasury officials were the only defendants. They initially asserted, as they do in this case, that the action could not be maintained. However, in *Green* the Government in its early responses vigorously asserted that not only should private segregated schools be granted tax exempt status but that it was required. Shortly before the *Green* court issued its permanent injunction, the Government changed course 180 degrees. After this abrupt reversal in position, there was, in effect, little if any contest.¹⁴

The district court reached its decision only after the use of questionable and tortured reasoning. It first gave

¹² Respondents also relied upon *McGlotten v. Connally*, 338 F. Supp. 448 (D. D. C. 1972) and *Crenshaw County Private School Foundation v. Connally*, 474 F. (2d) 1185. Neither of these cases involve the constitutional rights asserted by the University here.

¹³ Bittner & Kaufman: *Taxes and Civil Rights*: "Constitutionalizing" the Internal Revenue Code. 82 Yale L. Jor. 51, 59. "By analogy the issue of whether the plaintiff had 'standing to sue,' one might ask whether the defendant had 'standing to defend.'"

¹⁴ See, footnote 12.

unambiguous code provisions a construction that no court or Commissioner of Internal Revenue had ever before attempted during the entire history of the Internal Revenue Code's existence. Secondly, it concluded that the public policy of this nation is that private educational institutions may not discriminate on a racial basis. Such is not and never has been the public policy of this nation. *Cf. Moose Lodge, infra*. The district court did correctly express federal public policy as prohibiting federal support for private schools that practice race discrimination. But even *Green* conceded:

"Neither plaintiff's prayers nor defendants' policy seeks to stop intervenors from sending their children to segregated private schools at their own expense, paying the full cost of education at such schools. The question posed by intervenors' contentions is whether the schools of their private choice are entitled to government support through tax exemptions and deductibility of contributions. . . ."

Therefore, assuming the initial premise of *Green* and assuming further the validity of the Court's reasoning that an organization must be charitable in addition to being religious or educational or literary, etc., the Court had to go a step further to find "federal support of" or "federal involvement with" the schools in question; the *Green* court found such support and involvement in the form of a school's tax exempt status granted to said schools. Such finding is clearly erroneous and contrary to the decision of this Court in *Walz v. Tax Commission of the City of New York*, 397 U. S. 664.

Even the district court in *Green* recognized that religious freedoms may be invoked and refused to consider their impact:

"The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of re-

ligious purpose. . . We are not called upon to consider the hypothetical inquiry whether tax-exemption or tax deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion." 330 F. Supp. p. 1169.

This Court has never held that the Anti-Injunction Statute is a complete bar to suits which may directly or indirectly involve an injunction in tax matters. In *Nut Margarine*, the court allowed injunctive relief to halt the assessment and collection of an excise tax on margarine "[I]n cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax, there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collection. *Dows v. Chicago* 11 Wall 108, *Hannewinkle v. Georgetown*, 15 Wall 547, *State Railroad Tax Cases*, 92 U. S. 575, 614." 284 U. S. p. 509.

The two-fold test in *Nut Margarine* that complainant must first show the illegality of the assessment and second circumstances sufficient to bring the case within an acknowledged head of equity jurisprudence, has been met by the University here. A *prima facie* showing of illegality of the threatened revocation has been made. A showing of immediate and irreparable harm has been made sufficient to give rise to traditional equity jurisdiction. The University submits that if the *Nut Margarine* case was the sole standard for determining jurisdiction, there would be little doubt as to the propriety of the injunction issued by the District Court.

In *Williams Packing* this Court was faced with a situation involving a taxpayer's attack upon its liability for unemployment and social security taxes. The taxpayer sought a declaration that fishing boat crews were not its employees and, therefore, that no employment taxes were due. Injunc-

tive relief was sought and granted by the District Court. This Court reversed. "The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstance could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case, the attempted collection may be enjoined if equity jurisdiction otherwise exists." 307 U. S. p. 7.

Thus, the Court in *Williams Packing* seemed to strengthen the required showing from "illegality of the exaction" to a showing "that under no circumstance could the Government ultimately prevail." Literal application of the "under no circumstance" test would practically remove any exception to the Anti-Injunction Statute.¹⁵ As stated by Judge Boreman dissenting below "... it is unlikely that the Court [of Appeals] would assume to state positively, in advance, what the Supreme Court would hold under *any* given set of circumstances. To do so would be presumptuous indeed." (A., 139.)

However the *Williams Packing* "under no circumstance" test was predicated upon the existence of a more or less adequate remedy in the form of a refund suit. "... [I]f Congress had decided to make the availability of the injunctive remedy against the collection of federal taxes not lawfully due depend upon the *adequacy* of the remedy, it would have said so explicitly." 370 U. S. p. 6 (emphasis added). Without arguing the adequacy of a refund suit in the *Williams Packing* circumstances it is apparent that

¹⁵ *Federal Taxation: Section 7421(a) of Internal Revenue Code Literally Construed to Ban all Suits to Enjoin Assessment or Collection of Taxes*. Duke Law Journal. Vol. 1963: 175.

this court recognized the existence of some remedy when enunciating the "under no circumstance" test.

The Court of Appeals subjected the University to the practically impossible *Williams Packing* "under no circumstance" test and at the same time recognized that there is no remedy available to the University. "If Jones University is required to litigate its tax exempt status after that status has been withdrawn, we can predict with confidence that during the period of litigation it will lose gifts and contributions which will never be recoverable even if it is successful in having its tax exempt status restored." (A., 136.) Thus the Court of Appeals applied the "under no circumstance" test which had only been previously endorsed by this Court where some remedy was available, to a situation where admittedly there is no remedy at all.

It is necessary to distinguish between the present situation of no remedy and a finding of irreparable harm. Here virtually all exempt organizations are automatically subject to irreparable harm for which there is no remedy through the loss of advanced assurance and then contributions. In *Williams Packing* the irreparable harm allegedly would presumably result from the particular circumstance of the individual taxpayer there involved. If a taxpayer in the *Williams Packing* circumstance had adequate financial resources, the refund action would be a complete and adequate remedy. In the case of exempt organizations, all suffer a loss of contributions regardless of the individual organization's financial status. The *Williams Packing* test as applied by the Court of Appeals affects exempt organizations as a class rather than as individual taxpayers.

The power assumed and exercised by the taxing authority here is without remedy or restraint. Such a situation is strikingly different from that enunciated by this Court in *Williams Packing*. At the very least a midway point between the harsh rule of *Williams Packing* and the

more realistic view of *Nut Margarine* should be applied in the case of exempt organizations. The test applied by the Court of Appeals raises serious constitutional Due Process questions which can be avoided by the application of a test more suited to the realities surrounding exempt organizations.¹⁰

D. Does this case involve a suit to restrain the assessment or collection of a tax so as to trigger the provisions of the Anti-Injunction Statute?

Treasury officials have given the University a choice: it may suffer revocation of its tax exempt status or it may violate its religious principles and practices as expressed in its admissions policy and retain its tax exempt status. The decision desired by the government is clear: it desires a change of admissions policy. Upon the mere hope that the University might comply with government wishes, revocation action was deferred (A., 52). The first step in revocation procedures would be an attempt "to elicit conformance" (A., 53). If the initial attempt "to elicit conformance" failed, it would be repeated (A., 53). Certainly it is most unusual for Treasury officials to try so hard to avoid imposing a tax. The only reasonable conclusion is that the government is primarily interested in conformance rather than payment.

No matter how vigorously the merits and applicability of the Anti-Injunction Statute are argued one vital point is inescapable: If the University will accede to the demands of the Internal Revenue Service and abandon its religious beliefs and practices, no tax will be imposed. What the government seeks to enclose in the midst of tax cases is no more than a penalty. If the University does not

¹⁰ Statutes should be interpreted to preserve their constitutionality as applied. *Hadnote v. Amos*, 394 U. S. 358; *U. S. v. Vuitch*, 402 U. S. 62; *Watts v. U. S.*, 394 U. S. 705.

accede to the wishes of the government, it is subjected to a penalty in the form of taxes and loss of contributions.

The fact that this is not a tax case is pointed out by what the government would have the University do to avoid revocation of its tax exempt status. This entire controversy would be moot if the University were to change its admissions policy. The University would not be required to expend any sums, would not be required to make a single bookkeeping entry, and would not be required to affect its financial status in any way to avoid taxation. In effect, the alleged tax may be paid by the relinquishment of vital constitutional rights. This involves not revenue but rather unconstitutional compulsion.

In a country where government and legal system are based upon constitutional guarantees, one shudders at the present attempt of the government to convert currently popular social views of some into "public policy," to distort clearly-worded statutory provisions, and to bludgeon the most precious liberties of any free people in the guise of a tax. To allow the use of revenue provisions, not to collect revenue, but to trample constitutional guarantees in the guise of a tax is totally repugnant to our Constitution. The iron hand of repression is no less repugnant when clothed in the velvet glove of the revenue statutes.

It is apparent that the news releases of the Internal Revenue Service of July 10, 1970, and July 19, 1970 (A., 39, 40) were not connected in any way with the collection of federal revenues but instead were the attempt to use the onerous taxing power of the government to force recalcitrant parties in line with social concepts not in any way authorized by any act of Congress. As pointed out, if the University were willing to abandon its First Amendment rights, it would have no tax to pay. There has been no change in the operation of the University, its religious beliefs and practices and its admissions policy during its

entire forty-odd years of existence. The government has constantly held that the University was not subject to federal taxation because it was an exempt organization under the provisions of § 501 (c) (3). There has been no change in the University or the tax laws calling for additional revenue to federal coffers.

In *DeMasters v. Arand*, 313 F. (2d) 79 (1963), the taxpayer sought to restrain the Internal Revenue Service from investigating possible income tax liability for years barred by the Statute of Limitation in the absence of fraud. There the Court said:

"... If appellants were indeed prohibited by § 7650(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the Doctrine of Sovereign Immunity."

In a footnote, the Court stated:

"We are satisfied that this taxpayer's suit is neither one for the Declaratory Judgment 'with respect to federal taxes' precluded by 28 U. S. C. A. § 2201; nor an action 'for the purpose of restraining the assessment or collection of any tax' precluded by 26 U. S. C. A. § 7421(a)."

Similarly, the University here brings an action to enjoin the government from unconstitutional interference with rights guaranteed the University by the First and Fifth Amendments to the Constitution. This Court in *Hill v. Wallace*, 259 U. S. 44 rejected the attempt by Treasury Officials to dismiss the suit, contending that the action was an attempt to enjoin the collection of a tax contrary to a predecessor of § 7421(a), of the current Internal Revenue Code. The pertinent ruling in *Hill* was that simply clothing regulatory action in the guise of a tax does not invoke the Anti-Injunction Statute. The Court stated:

"It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the

purpose of regulating the conduct of businesses of boards of trade through the supervision of the Secretary of Agriculture and the use of an administrative tribunal. . . . The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevance to the collection of a tax at all. . . . The act is in essence and on its face a complete regulation of boards of trade, with a penalty of \$20 a bushel on all 'futures' to coerce boards of trade and their members into compliance."

Likewise, the government's threatened action is in essence an attempt to regulate the admissions policies of private schools with a penalty of loss of tax exempt status to coerce private schools into compliance.

E. Do Federal Courts have inherent jurisdiction under the Constitution to grant injunctive relief against Treasury Officials where a prima facie showing has been made of irreparable injury and of illegal and unconstitutional threatened action?

The propriety of granting injunctions in cases where government officials act or threatened to act illegally or unconstitutionally has been recognized by this Court in a long line of cases commencing with *United States v. Lee*, 106 U. S. 196 (1882). These cases hold that federal courts have inherent jurisdiction to restrain illegal or unconstitutional actions by federal officers. Such recognition does no damage to the long-standing doctrine of sovereign immunity. The sovereign cannot act illegally or unconstitutionally and therefore if the action is unconstitutional or illegal the action is not the action of the sovereign and no sovereign immunity is involved. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, is in point. There the Court stated:

"These two types have frequently been recognized by this Court as the only ones in which a restraint may

be obtained against the conduct of government officials. The rule was stated by Mr. Justice Hughes in *Philadelphia Co. v. Stimson*, 1912, 223 U. S. 605, 620, 32 S. Ct. 340, 334, 56 L. Ed. 570, where he said '... in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. [Citing cases] And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred.' 337 U. S. at 690, 691.

In *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 409 F. (2d) 718 (1969), the Court in considering the jurisdiction issue stated:

"It is now clear that there is implied injunctive remedy for threatened or continuing constitutional violations. See *Bell v. Hood*, 327 U. S. 678, 684 and n. 4, 66 S. Ct. 773, 90 L. Ed. 939 (1946); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 696-697, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949); *Ex Parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908); *United States v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882). This exercise of the general equity powers of the Federal Court initially may have developed in part because of the lack of equity jurisdiction in many of the states. See *Hart & Wechsler*, *supra* at 578, 650-651. But injunctive relief also seems to be an essential corollary to the power of judicial review established by *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803). The power to declare an action of the legislative or executive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action. Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to as-

sert it. Cf. *Crowell v. Benson*, 285 U. S. 22, 56-61, 52 S. Ct. 285, 76 L. Ed. 598 (1932). Thus, even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by governmental officials, there are strong reasons for inferring that existence of this power under any general grant of jurisdiction to the federal courts by Congress."

When *Bivens* went to this Court, 403 U. S. 388, Mr. Justice Brennan stated on the point here involved:

"Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. . . . And 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" 403 U. S. at p. 341, 342.

By treating this matter as strictly a tax case, the Court Appeals has created the potential for enormous abuses of power. Not only may currently popular views be coerced upon dissenting exempt organizations, but those unfortunate enough to find their names on an "enemies list" may find their politics as well as their religion subject to preemptory taxation. Unfettered control over the financial life and death of a multitude of organizations, from ultra-conservative to ultra-liberal, would ultimately lead to mediocrity and conformity, conformity with the views of the taxing authority then in power.

The University is in no way seeking to enjoin the assessment of collection of a tax, nor is it seeking a declara-

tory judgment. The University is seeking to enjoin what it contends to be, and what the facts clearly show to be, an action on the part of the government clearly beyond the authority conferred upon it by acts of Congress and clearly violating the constitutional rights of the University to freely practice its religious beliefs without governmental interference and to operate as a tax exempt organization free from discriminatory actions. These actions on the part of government officials bear no relationship to the federal revenues except to use the threat of the considerable burdens of taxation to cause a relinquishment of basic rights guaranteed by statute and the Constitution. The Government seeks to use its biggest stick: the power to tax is the power to destroy. If the government is actually interested in the federal revenue, it would seem far more sensible to meet the issue head on and decide it promptly instead of seeking to delay a judicial determination many months in the future.¹⁷

The University is aware of those cases dismissing actions for want of jurisdiction where the question presented involved the tax exempt status of institutions. *Jolles Foundation, Inc. v. Moysey*, 250 F. (2d) 166, *Kyron Foundation v. Dunlap*, 110 F. Supp. 428. But these cases are not applicable here. The University does not ask the Court to substitute its judgment for that of a federal officer acting in his official capacity. The entire thrust of this action is that the appellants are threatening to act outside their authority, to exercise judgment and discretion which is not within their power and because of its unconstitutional nature is beyond the power of the federal government.

If the question here was not the validity of the action threatened but the applicability of such action to the Uni-

¹⁷ The government may waive the Anti-Injunction Statute. *Helvering v. Davis*, 301 U. S. 619.

versity, it would be a different case. For example, if there were no contest as to the legality of the federal government acting through the Treasury Department and the Internal Revenue Service revoking the University's tax exempt status because of its admissions policy, but rather a contest involving the applicability of such a rule to the factual situation here, there could well be a case where the court was asked to preempt the valid discretionary power of a Federal officer, but the University has stated in sworn pleadings that it discriminates in its admissions policy and thus comes squarely within the avowed policy of the government. This is not a case where the Commissioner must decide whether the University has a racially nondiscriminatory admissions policy. The University challenges not the applicability of the Rule, but the Rule itself.

II. IS THE REVOCATION OF THE UNIVERSITY'S TAX EXEMPT STATUS SOLELY BECAUSE OF ITS RELIGIOUS BELIEFS AS EXPRESSED IN ITS ADMISSIONS POLICY ILLEGAL OR UNCONSTITUTIONAL?

A. Is the threatened revocation of the University's tax exempt status unlawful and contrary to the clear and unambiguous provisions of the Internal Revenue Code?

The threatened action of the government seeking to revoke the tax exempt status of Bob Jones University unless the University establishes and maintains a racially non-discriminatory admissions policy would be contrary to the provisions of § 501 (c)(3) of the Internal Revenue Code of 1954. That section provides exemption from taxation for:

"Corporations, and any community chest, fund, or foundation organized and operating exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for the prevention

of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

This statutory exemption from income taxation for such organizations has existed for many years, along with comparable sections which have excluded in whole or in part from the taxable income of donors, their contributions or donations to such organizations.¹⁸ Little, if any, change has occurred in the criteria or language of these provisions since their earliest enactment.

Under the language of § 501(c)(3) an organization is entitled to exemption from taxation if it meets the following requirements: (1) If it is organized and operated exclusively for religious, charitable . . . or educational purposes; (2) If no part of its net earnings inure to the benefit of any private shareholder or individual; and (3) If it does not conduct or engage in political or lobbying activity. *Stevens Bros. Foundation, Inc. v. Commissioner of Internal Revenue*, 324 F. (2d) 633 (8 Cir. 1963). The question then is whether the admissions policy of Bob Jones University is such that it cannot be classed as organized and operated exclusively for religious or charitable purposes. Government officials would read into the language of this section the additional condition that even though a religious, charitable or educational organization is to be exempt, it must also practice racially non-discriminatory admissions policies. It is the University's contention that such a reading and interpretation of this statute is contrary to its

¹⁸ See § 101(6) of the Internal Revenue Code of 1939 and prior revenue acts.

plain and unambiguous terms and to the intention of the Congress which enacted it and the subsequent Congresses which have repeatedly reenacted it.

An elementary and well-established rule of statutory construction is that when the meaning of a statute is clear and unambiguous on its face, then it is not subject to explanation or interpretation. The plain meaning of the language is controlling. Nothing is stated in the language of this section with regard to the admissions policies of an educational organization. All that is required is that it be organized and operated for one of the purposes listed in the section. The regulations promulgated by the Secretary of the Treasury recognized that which is evident from a reading of this section.

“(i) An organization may be exempt as an organization described in § 501(c)(3) if it is organized and operated exclusively for *one* or more of the following purposes:

- (a) Religious
- (b) Charitable
- (c) Scientific
- (d) Testing for Public Safety
- (e) Literary
- (f) Educational, or
- (g) Prevention of cruelty to children or animals.

* * *

“(iii) *Since each of the purposes specified in Subdivision (i) of this subparagraph is an exempt purpose in itself*, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. If, in fact, an organization is organized and operated exclusively for an exempt purpose, or purposes, exemption will be granted to such an organization regardless of the purpose or purposes specified in its application for exemption. For example, if an

organization claims exemption on the ground that it is 'educational,' exemption will not be denied if, in fact, it is 'charitable.' Treas. Regs. § 1.501(c)(3)-1(d)(1)" [Emphasis added].

The term "educational" is defined in Treasury Regulations § 1.501(c)(3)-1(d)(3) for purposes of its use in § 501(c)(3) as relating to:

"(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

"An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion."

The first example given of an organization in the regulation quoted from above is as follows:

"An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on."

Bob Jones University was organized "to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures." (A., 15.) The University offers educational instruction to the individual through its College of Arts and Sciences and its School of Religion, Education, Fine Arts, and Business Administration. It has

a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

Clearly, Bob Jones University, organized and operated for the foregoing purposes, is an organization which meets the requirements set out in the plain language of § 501(c) (3) of the Internal Revenue Code of 1954 and the Treasury Regulations promulgated thereunder and quoted above. What is amazing is that Treasury officials have not questioned any of the facts stated in the immediately preceding paragraph. The sole reason for the threatened revocation of the exempt status of Bob Jones University is that as an expression of its religious beliefs it practices a racially discriminatory admissions policy. Apparently the government's position is that such an organization is contrary to public policy and is not therefore a charitable organization and is not entitled to an exempt status.

To require that an organization must be "charitable" in addition to being "religious" or "educational" would, in the first place, be contrary to the plain and unambiguous language of § 501(c)(3) and would require a tortured reading thereof. The term "charitable" is only one of a number of adjectives appearing in § 501(c)(3) which are descriptive of organizations which may be exempt from taxation. If it is organized for and "engaged primarily in activities which accomplish *one or more* exempt purposes specified in § 501(c)(3) of the 1954 Code," then it is entitled to exemption. *Broadway Theater League of Lynchburg, Va., Inc. v. United States*, 393 F. Supp. 346, 353 (D. C. Va. 1968). [Emphasis added] Under no reading of § 501(c)(3) can the word "charitable" be said to modify the words "religious" or educational." Such an interpretation as that would make "taxpayers of those whom the Act, properly construed, does

not tax." *Independent Petroleum Co. v. Fly*, 141 F. (2d) 189, 191 (5 Cir. 1944).

Conceding, without admitting, that the terms of § 501(c)(3) are ambiguous and subject to interpretation, then any such ambiguities should be resolved in favor of Bob Jones University.

"It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import." *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 508. See also, *Helvering v. Bliss*, 293 U. S. 144, C. F. *Mueller Co. v. Commissioner of Internal Revenue*, 190 F. (2d) 120 (3 Cir. 1951).

Even assuming that the construction placed upon § 501(c)(3) by the government is correct, it is the University's position that it would still be entitled to tax exempt status as a "charitable"—organization. Under Treasury Regulations § 1.501(c)(3)—1 (d) the term "charitable" is defined as follows:

The term "charitable" is used in § 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in § 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; *Advancement of religion*; *advancement of education* or science; erection or maintenance of public buildings, or works; lessening of the burdens of government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency . . . The fact that an organization, in carrying

out its primary purpose, advocates social or civil changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under § 501(c)(3) so long as it is not an "action organization" of any one of the types described in Paragraph (c) (3) of this section [Emphasis added].

It is virtually impossible to include all of the purposes which have been held by the courts to be charitable purposes. Perhaps the classic expression of the judicial idea of the scope of charitable purposes is that of Lord McNaughten in the case of *Commissioners for Special Purposes of Income Tax v. Pemsel*, AC 531, 583 (1891): "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; trusts for other purposes beneficial to the community, not falling under any of the preceding heads." It is apparent however that organizations or trusts established for the advancement of education or religion have long been recognized as charitable. Restatement (2nd) Trusts, § § 370(a), 371, 371(d); 4A. Scott, *The Law of Trusts*, § § 370, 371 (Third edition 1967). "[A]ll gifts for the promotion of education are charitable in the legal sense." *Russell v. Allen*, 107 U. S. 163, 172. Nor is a trust for education any less a charitable trust "although the persons to receive the education are of a limited class, if the class is not so small that the purpose is not of benefit to the community. Thus, a trust for the education of children living in a certain district is charitable. So is a trust to educate persons of a particular race or religion." 4 A. Scott, *Trusts*, § 370.6. For example, a trust for the benefit of "worthy, deserving, poor, white, American, Protestant, democratic, widows and orphans" was upheld in *Beardsley v. Selectmen of Bridgeport*, 53

Conn. 489, 3 A. 557 (1885). In the more recent case of *In Re Estate of Robbins*, 21 Cal. Rptr. 797, 371 P. (2d) 573 (1962), Justice Traynor, writing for the majority of the Supreme Court of California, upheld a trust as charitable which provided for the education, maintenance and support of "such minor Negro child or children, whose father or mother, or both, have been incarcerated, imprisoned, detained or committed in any federal, state, county or local prison or penitentiary, as a result of the conviction of a crime or misdemeanor of a political nature." In light of these authorities, it is difficult to imagine how Bob Jones University, organized and operated "to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures," (A., 15). does not come within the term "charitable" in its generally accepted legal sense.

It is true that as a general rule a purpose is not charitable if its accomplishment is not of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity. Restatement (2nd) Trusts § 368(b). It is also true that "a trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law is invalid." Restatement (2nd) Trusts § 377(c). However, as has already been pointed out, a trust for the purpose of the advancement of education and/or religion has long been recognized as charitable and therefore as beneficial to the community and as not being against public policy. Mr. Justice White recognized this in his concurring opinion in *Evans v. Newton*, 382 U. S. 296, 302, when he stated "the first three categories identified by Lord MacNaughten designate trust purposes that have long been recognized as beneficial to the community as a whole—

whether or not immediate benefit is restricted to a relatively small group. . . ." Is it against public policy for a purely private educational and religious institution, receiving no assistance from either federal or state governments, to practice a racially discriminatory admissions policy based upon its religious belief that the separation of the races is dictated by the Holy Scriptures? Furthermore, these beliefs and practices have not sprouted as a response to court rulings requiring integration of public schools. They are not of recent vintage but have existed since the founding of the University some forty years ago. Is it against public policy for a religious and educational institution and organization to practice its religious beliefs? The language and holding of the Court in the case of *Commissioner of Internal Revenue v. Tellier*, 383 U. S. 687, 694, is particularly appropriate in answering this last question. There the Court held that the taxpayer might deduct the expenses he incurred in his unsuccessful defense of criminal prosecution in connection with securities transactions. Mr. Justice Stewart, delivering the opinion of the Court, stated: "No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense. This is not 'proscribed conduct,' it is his constitutional right." Likewise in this instance, the University's admissions policies are based upon the free exercise of its religious beliefs, which is guaranteed by the First Amendment to our Constitution. The exercise of constitutional rights does not offend public policy.

B. Is the threatened revocation of the University's tax exempt status unlawful and beyond the delegated powers of Treasury Officials?

Supervision of the administration and enforcement of the Internal Revenue Code is entrusted to the Secretary of

the Treasury.¹⁹ Under § 7802 of the Internal Revenue Code, the office of the Commissioner of Internal Revenue is created. That officer "shall have such duties and powers as may be prescribed by the Secretary."²⁰ Congress has further provided that "the Secretary or his delegate shall prescribe all needful rules and regulations as may be necessary by reason of any alteration of law in relation to Internal Revenue."²¹

The authority granted to the Secretary of the Treasury or his delegates in the sections cited above has been clearly defined by the courts. It is the Congress and not the Secretary of the Treasury nor the Commissioner of Internal Revenue that prescribes the tax laws. That power cannot be delegated by the Congress. *Dixon v. U. S.*, 381 U. S. 68, *Commissioner of Internal Revenue v. Produce Reporter Company*, 207 F. (2d) 586 (7 Cir., 1953); *Commissioner of Internal Revenue v. Landers Corp.*, 210 F. (2d) 188 (6 Cir. 1954); *Commissioner of Internal Revenue v. Winslow*, 113 F. (2d) 418 (1 Cir. 1940); *Northern Natural Gas Co. v. O'Malley*, 277 F. (2d) 128 (8 Cir. 1960); *Lincoln Electric Co. Employees' Profit-Sharing Trust v. Commissioner of Internal Revenue*, 190 F. (2d) 236 (6 Cir. 1951); *A & N Furniture & Appliance Co. v. United States*, 271 F. Supp. 40 (D. C. Ohio, 1967). Perhaps the best statement of the rule is found in the case of *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129:

The power of an Administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the Statute. A regulation which does not do this but operates to cre-

¹⁹ 26 U. S. C. § 7801.

²⁰ 26 U. S. C. § 7802.

²¹ 26 U. S. C. § 7805.

ate a rule out of harmony with the statute is a mere nullity. 297 U. S. p. 134.

The purpose of administrative regulations and rulings is to construe an ambiguous statute and to thereby clarify its meaning. However, rulings and regulations cannot be made which are contrary to unambiguous language of the law. *U. S. v. Shirah*, 253 F. (2d) 798 (4 Cir. 1958). "A right clearly created by statute cannot be taken away by regulation." *Northern Natural Gas Co. v. O'Malley*, *supra*. Nor does the power to make rules and regulations extend to making taxpayers of those whom the statute does not tax. *Independent Petroleum Corp. v. Fly*, 141 F. (2d) 189, 191 (5 Cir., 1944).

It is argued elsewhere in this brief that the threatened actions of the appellants in this litigation would be contrary to the plain and unambiguous language of § 501 (c) (3) of the Internal Revenue Code of 1954. It has also been argued that the University meets the requirements set out in § 501 (c) (3), and those arguments and authorities will not be recited at this point. Section 501 (a) authorizes tax exemption to those organizations described in 501 (c) (3). It states that such an organization "*shall* be exempt from taxation." 26 U. S. C. A. § 501 (a). [Emphasis added.] It does not say that such an organization "*may*" be exempt from taxation if the Secretary of the Treasury or the Commissioner of Internal Revenue so chooses. Usually, "*shall*" is the language of command. *Northern Natural Gas Co. v. O'Malley*, *supra*. Here, Treasury Officials have made no finding that the University is not a religious and/or educational organization. They have threatened to revoke the University's existing tax exempt status solely because it exercises its religious beliefs. The University respectfully contends that such action on the part of Treasury Officials would violate the authority granted to them by the Congress in that it

would enable them to write into the law an additional requirement for tax exemption. It would allow them to make law. It would allow them to make taxpayers of those persons whom the law does not tax.

This is not to deny the right of Treasury Officials to correct an erroneous ruling of law in proper circumstances. *Automobile Club of Mich. v. Commissioner of Internal Revenue*, 353 U. S. 180. Here, there is no error of law to be corrected by the threatened action. The language of § 501 (c) (3) is clear and the University meets the requirements of that language. Even if there be any room for interpretation of this section by the government, its own regulations plainly state that each of the purposes listed in § 501 (c) (3) "is an exempt purpose in itself." Treas. Regs. 1.501 (c) (3)—1 (d) (1). Surely the government is as bound by its own regulations as the University. *Petroleum Heat & Power Co., Inc. v. U. S.*, 405 F. (2d) 1300 (Ct. Cl., 1969).

If the Congress had intended to prohibit the tax exempt status for organizations which are otherwise religious, or educational, or charitable, but which practice racially discriminatory admissions policies, it would have so provided. It has not chosen to do so. Instead, it has repeatedly reenacted § 501 (c) (3) in substantially the same language as it now appears in its present form. The fact that Congress has chosen not to change the law indicates Congressional approval of the interpretation of § 501 (c) (3), contended for by the University and up until recently implemented by the government. *United States v. Correll*, 389 U. S. 299, *Cammarano v. United States*, 358 U. S. 498, *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, *United States v. 525 Company*, 342 F. (2d) 759 (5 Cir., 1965). Against the repeated reenactment of this section by Congress and the Treasury's prior longstanding and consistent

administrative interpretation of it, the present action threatened by the government cannot be allowed. To allow treasury officials to revoke the tax exempt status of Bob Jones University would be to sanction an act which exceeds their authority under the law.

C. Is the threatened revocation of the University's tax exempt status in violation of the First Amendment to the Constitution in that it would deprive the University of its right to the free exercise of its religious beliefs and would promote, benefit and establish religion?

The First Amendment specifically applies to the rights of the University and its students to express their own educational religious theories and beliefs. In *Griswold v. Connecticut*, 381 U. S. 479, the Court held that such constitutional protection extended to

... the liberty of parents and guardians to direct the upbringing and education of children under their control. (381 U. S. p. 495.)

The right to educate a child in a school of the parents' choice—whether public or private or parochial—. . . to study any particular subject or any foreign language . . . to express one's attitudes or philosophies . . . (381 U. S. pp. 482-83.)

In this regard the Court followed its earlier holding in *Pierce v. Hill Military Academy*, 268 U. S. 510:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power to the state to standardize its children by forcing them to accept instruction from public teachers only.

Justice Brennan, concurring in *School Dist. of Abingdon v. Schempp*, 374 U. S. 203, said:

Attendance at public schools has never been compulsory; parents remain morally and constitutionally

free to choose the academic environment in which they wish their children to be educated.

The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experience of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent. (p. 1582.)

And, as noted in *U. S. v. Williams*, 341 U. S. 70,

... it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters ... *NAACP v. Ala.*, 357 U. S. 449 at 460 (1958).

First Amendment rights are protected even though their purpose is the peaceful advocacy of anti-constitutional or even illegal ends, *Elfbrandt v. Russell*, 384 U. S. 11. Thus, rights of communists must be protected even by compelling the employment of conceded communists in defense security positions, *U. S. v. Robel*, 389 U. S. 258, or on federally subsidized shipping, *Schneider v. Smith*, 390 U. S. 17. First Amendment rights must be protected although it favors a political dictatorship, *Schneiderman v. U. S.*, 320

U. S. 118, or the establishment of a Nazi state, *U. S. v. Korner*, 56 F. Supp. 242 or is intended to oppose national policy or law, *Bond v. Floyd*, 385 U. S. 116. Such freedom may not be discouraged whether it be ultra-conservative or ultra-liberal, *Liberty Lobby, Inc. v. Pearson*, 390 F. (2d) 489. There, Mr. Chief Justice Burger took occasion to say:

... programs of "political education" some of which contain overtones of anti-semitism and racism ... however reprehensible, are within the areas covered by the First Amendment. *Liberty Lobby, Inc. v. Pearson*, 390 F. (2d) 489 (D. C. Cir. 1968).

Or, as expressed in one of the famous dissents of Justice Holmes, since become the doctrine of the Court,

If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. *U. S. v. Schwimmer*, 279 U. S. 644.

In *W. Va. State Bd. of Ed. v. Barnette*, 319 U. S. 624, the rationale for this principle was fully discussed:

We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly." 357 U. S. at 526. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*, 357 U. S. at 518.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

First Amendment rights are equally applicable to the support of racial objectives, even though otherwise illegal action is involved, *NAACP v. Ala.*, 357 U. S. 449, or where the doctrine advocated is one of racial supremacy, *Cooper v. Pate*, 382 F. (2d) 518. In *Evans v. Newton*, 382 U. S. 296, the Court said:

If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered.

"The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Magnano Co. v. Hamilton*, 292 U. S. 40, 44-45. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. . . ." *Murdock v. Pennsylvania*, 319 U. S. 105, 112.

In the *Murdock* case, this Court held a tax levied upon a missionary evangelist to be unconstitutional under the First Amendment. Similarly in *Follett v. Town of McCormick*, 321 U. S. 573, the Court held unconstitutional an ordinance providing for a business license for anyone selling books within the corporate limits of the Town of McCormick, South Carolina, as applied to a Jehovah's Witness who went from house to house selling books. The Court concluded that the ordinance sought to impose a tax on the exercise of a privilege granted by the Bill of Rights and was therefore an unconstitutional exaction. In its concluding sentence, the Court stated that one cannot be required

to "pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." 321 U. S. p. 578.

The University receives no federal tax benefits by reason of its exempt status, for if it did, it, as well as all exempt religious organizations, would be involved in impermissible federal entanglement with religion.²² The government would ignore the "benevolent neutrality" doctrine of *Walz v. Tax Commission*, 397 U. S. 664. Furthermore, to state that no tax is imposed as a condition to inherent religious activity in the case is absurd. Uncontroverted evidence (A., 43-44) demonstrates the cost of taxes to the University to continue exercising its religious beliefs will exceed half a million dollars a year if the government has its way.

This Court has held that the First Amendment is in effect a two-edged sword barring the state from establishing or forcing a particular religious perspective upon a citizen and as well providing that the state cannot "hamper" *Everson v. Board of Education*, 330 U. S. 1, "handicap" *Abington v. Schempp*, 374 U. S. 203, or "inhibit" *Board of Education v. Allen*, 392 U. S. 236, a citizen in the free and legitimate exercise of his religion.

The United States Supreme Court in *Committee for Public Education and Religious Liberty v. Nyquist*, — U. S. —, 93 S. Ct. 2955 (1973), reviewed previous Court decisions dealing with the impact of the establishment clause upon various schemes which face constitutional problems in the area of sectarian education.

Taken together these decisions dictate that to pass muster under the establishment clause, the law in question first must reflect a clearly secular legislative purpose, *e. g.*, *Epperson v. Arkansas*, 393 U. S. 97, 89

²² *Committee for Public Education and Religious Liberty v. Nyquist*, — U. S. —, 93 S. Ct. 2944.

S. Ct. 266, 21 L. Ed. (2d) 228 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e. g.*, *McGowan v. Maryland*, *supra*; *School District of Abington Twp. v. Schempp*, 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. (2d) 844 (1963), and third, must avoid excessive government entanglement with religion, *e. g.*, *Walz v. Tax Commission*, *supra*.

Applying these three criteria to the situation here indicates that exempt status for the University does pass muster under the establishment clause. Tax exempt status for religious and educational institutions is practically universal. The Congress and numerous state legislatures have been motivated by a clearly secular purpose. Religion and education have historically been considered of overall benefit to the community.²³ A plurality of divergent religions have contributed greatly to the development of this country. Second, the primary effect of tax exemptions neither advances nor inhibits religion.²⁴ The huge class of organizations entitled to exempt status encompasses educational and religious organizations of every stripe. Atheists and Black Muslims as well as Bob Jones University are entitled to exemption. No religion is favored and none hindered. Third, the granting of exempt status does not involve excessive government entanglement with religion. The government simply declines to tax or interfere with such organization; it exercises "benevolent neutrality." On the other hand the course set by Treasury Officials in the instant case would lead to the very type of entanglement condemned in *Nyquist* and *Walz*. The government here seeks to control religious beliefs and practices selected by it. It seeks to inquire into and police their practices all contrary to the spirit of the establishment as well as the free exercise clause of the First Amendment. This is particularly true in

²³ See *Russell v. Allen*, *supra*; *Commissioner for Special Purposes of Income Tax v. Pemsel*, *supra*.

²⁴ *Walz v. Tax Commission*, *supra*.

the case of the University where such entanglement involves not only routine administrative policies but goes to the very heart of the University's existence and to the core of its religious principles.

In *Sherbert v. Verner*, 374 U. S. 398, Sherbert was denied unemployment compensation benefits because of her refusal to work on Saturdays. The South Carolina Supreme Court had upheld the denial of benefits, saying that such place no restriction upon her freedom of religion. This Court reversed and in so doing held:

The ruling forces her to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. (374 U. S. p. 404.)

It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. (374 U. S. p. 404.)

In *Speiser v. Randall*, 357 U. S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. (374 U. S. p. 405.)

The threat by Treasury Officials to revoke the tax exempt status of the University constitutes an attempt to impose a penalty upon a religious organization. The threat has arisen because of the University's restricted admissions policy which was formulated when the University was

founded. The policy is dictated by the religious beliefs of the University that the Holy Scriptures forbid the intermarriage of the races. Thus, only one conclusion can be drawn, i. e., the penalty threatened to be imposed is to be imposed because of the University's religious beliefs.

The University has chosen the field of education as its vehicle for the spread and teachings of its religious beliefs and philosophies. There is no distinction between the threat to the University's pursuit of its religious activities and the tax struck down in *Murdock, supra*, or in *Follett, supra*. Nor is there any distinction between the University's refusal to surrender its deeply-rooted religious beliefs and the unconstitutional restriction sought to be imposed upon Mrs. Sherbert by denying her unemployment compensation benefits because of her refusal to work on Saturdays, which refusal was prompted by her religious beliefs.

This court had occasion to examine the relationship between tax exemptions and First Amendment rights in *First Unitarian Church v. County of Los Angeles*, 357 U. S. 545, a companion case to *Speiser v. Randall*, 357 U. S. 513. In these cases the State of California had refused to grant tax exempt status to veterans who refused to sign loyalty oaths. In *First Unitarian Church*, Mr. Justice Douglas, with Mr. Justice Black concurring, stated:

What I have said in *Speiser v. Randall* and *Prince v. City and County of San Francisco*, 357 U. S. 513, is sufficient for these cases as well. But there is a related ground on which the decision in these Unitarian cases should rest. We know from the record one principle of that church: "The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church

of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs."

• • •

There is no power in our Government to make one bend his religious scruples to the requirements of this tax law.

Here the government is attempting to exercise alleged power to make the University bend its religious scruples to the requirements of the tax law. There is no such power in our government.

In a second companion case to *Speiser, First Unitarian Church v. County of Los Angeles*, 357 U. S. 513, Mr. Justice Black stated:

California, in effect, has imposed a tax on belief and expression. In my view, a levy of this nature is wholly out of place in this country; so far as I know such a thing has never even been attempted before. I believe that it constitutes a palpable violation of the First Amendment, which of course is applicable in all its particulars to the States. [citing cases] The mere fact that California attempts to exact this ill-concealed penalty from individuals and churches and that its validity has to be considered in this Court only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment. We should never forget that the freedoms secured by that Amendment—Speech, Press, Religion, Petition and Assembly—are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities [citing cases.]

• • •

I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the

principles of freedom upon which this Nation was founded and which have helped to make it the greatest in the world. As stated in prior cases, I believe "that the First Amendment grants an absolute right to believe in any governmental system, [to] discuss all governmental affairs and [to] argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged. I happen to believe this was a wise choice and that our free way of life enlists such respect and love that our Nation cannot be imperiled by mere talk." . . .

The granting of tax exemptions to religious organizations has been thoroughly treated in *Walz*.²⁵ There an attack was launched upon the New York statute granting property tax exemption to religious organizations for religious properties used solely for religious worship. The constitutional basis for the attack was that the grant of an exemption constituted sufficient government support for religion to violate the First Amendment establishment clause. Recognizing that the First Amendment does not deal in absolute terms, Mr. Chief Justice Burger stated:

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or

²⁵ See: *Constitutional Law: Tax Exemption and Religious Freedom*, 54 *Marquette Law Rev.* 385.

governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U. S., p. 669.

* * *

The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. 397 U. S., p. 672.

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. . . . The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other. 397 U. S., pp. 675, 676.

Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries, along with many other exempt organizations. 397 U. S., p. 676.

For so long as federal income taxes have had any potential impact on churches—religious organizations have been expressly exempt from the tax. Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to ex-

ercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference. 397 U. S., pp. 676, 677.

* * *

In the instant case, it is significant that the purpose of Bob Jones University as a religious and educational institution has remained steadfastly the same and has, for more than 40 years, been accorded tax exempt status.

Returning to the *Walz* decision, Mr. Justice Brennan, concurring, stated:

[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society. 397 U. S., p. 689.

The concurring opinion of Mr. Justice Harlan states:

I think, moreover, in the context of a statute so broad as the one before us, churches may properly receive an exemption even though they do not themselves sponsor the secular-type activities mentioned in the statutes but exist merely for the convenience of their interested members. As long as the breadth of exemption includes groups that pursue cultural, moral or spiritual improvements in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups. 397 U. S., 697.

In the instant case noninvolvement is further assured by the neutrality and breadth of the exemption. In the context of an exemption so sweeping as the one before us here its administration need not entangle

government in difficult classifications of what is or is not religious, for any organization—although not religious in a customary sense—would qualify under the pervasive rubric of a group dedicated to the moral and cultural improvement of men. Obviously the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement in evaluating the character of the organizations. *Cf. Presbyterian Church in United States v. Mary Eliz. Blue Hall Memorial Presbyterian Church*, 393 U. S. 440, 89 S. Ct. 601, 21 L. Ed. 658 (1969). 397 U. S. pp. 698, 699.

This Court has recently delivered its opinion in the case of *Wisconsin v. Yoder*, 406 U. S. 205. While that opinion did not directly involve taxes, the matter presently before the Court does not in reality pertain to taxes either. The *Yoder* decision did involve a conflict between a firmly fixed public policy issue and the free exercise provisions of the First Amendment. In *Yoder*, the State of Wisconsin had successfully prosecuted parents of Amish children because of their violation of the compulsory school attendance law. The criminal prosecutions were defended by the Amish upon the grounds that their children's attendance at high school was contrary to the Amish religion and way of life. The Court recognized the power of the state to impose reasonable regulations for the control and duration of basic education, stating: "providing public schools ranks at the very apex of the function of a state." 406 U. S. p. 213. Thus, there was no question but that the very clearly pronounced public policy of the State of Wisconsin required compulsory high school education. Mr. Chief Justice Burger stated that the

"... State's interests in universal education, however high we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by

the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. . . ." 406 U. S. p. 214.

The Yoder opinion is analogous and demonstrates the right of the University and its students to freely exercise their religious beliefs notwithstanding the claimed public policy requiring a racially nondiscriminatory admissions policy.

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. 406 U. S. p. 214.

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. 406 U. S. p. 215.

. . .

The impact of the compulsory attendance law on respondents' practice of the Amish religion is not only severe, but inescapable. . . . It carries with it precisely the kind of objective danger to the free exercise of religion which the First Amendment was de-

signed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat to undermining the Amish community and religious practice as it exists today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region. 406 U. S. p. 218.

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs. 406 U. S. p. 219.

The similarity between the just-quoted language and the situation confronting Bob Jones University is striking. To paraphrase, it can just as easily be said of the matter at bar that:

The impact of the revocation of the University's tax exempt status on the University and its students is not only severe, but inescapable. . .

It carries with it precisely the kind of objective danger to the free exercise of religion which the First Amendment was designed to prevent. As the record shows, the threatened revocation carries with it a very real threat to undermining the continued existence of the University and its religious practices of teaching and promulgating its fundamentalistic religious beliefs through the field of education; the University must either abandon its religious beliefs and teachings and be assimilated into society at large by adopting a non-discriminatory admissions policy, or be forced to migrate to some other and more tolerant region.

In sum, the unchallenged record, in excess of 40 years of consistent practice, and strong evidence of a sustained faith pervading and regulating the University and its students' entire mode of life (and its finan-

cial lifeblood) support the claim that enforcement of the Treasury Department's requirement of a nondiscriminatory admissions policy would gravely endanger if not destroy the free exercise of the University's religious beliefs.

Returning now to the *Yoder* opinion, Chief Justice Burger went on to say:

Wisconsin concedes that under the Religious Clauses, religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, *e. g.*, *Gillette v. United States*, 401 U. S. 437 (1971); *Braunfeld v. Brown*, 366 U. S. 599 (1961); *Prince v. Massachusetts*, 321 U. S. 158 (1944); *Reynolds v. United States*, 98 U. S. 145 (1878). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. *E. g.*, *Sherbert v. Verner*, 374 U. S. 398 (1963); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); *Cantwell v. Connecticut*, 310 U. S. 296, 303-304 (1940). This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. Cf. *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971).

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Sherbert v. Verner*; cf. *Walz v. Tax Com.*, 397 U. S. 664 (1970). The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses.

"We have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed." *Walz v. Tax Commission*, 397 U. S. at 672.

406 U. S. pp. 219-221.

In short, the threatened action against the University violates its constitutional right to the free exercise of its religious beliefs as contained in the First Amendment.

In the case of *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163 this Court reversed the decision of a three-judge district court, which had held that granting a liquor license, with attendant state supervision, to a private club constituted sufficient state involvement in the operation of the club so as to prohibit racially discriminatory admissions practices. This Court found no constitutional prohibition against the Moose Lodge's discriminatory membership and

guest regulations and insufficient "state action". Recognizing the necessity of some involvement between the State and private entities, the Court clearly recognized that all involvements do not constitute state involvement in constitutionally prohibited conduct.

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the equal protection clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to State regulation in any degree whatever. Since the State-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the *Civil Rights Cases*, *supra*, and adhered to in subsequent decisions." 407 U. S. p. 173.

It is apparent that in the instant case there would be far more federal involvement in the operation of the University than at present if the University were subject to taxation. Tax exempt status is as much a necessity for religious and educational institutions, such as the University, as fire and police protection for the Moose Lodge.²⁶

Furthermore, if tax exempt status constitutes a federal benefit, it "would utterly emasculate the distinction between private as distinguished from State conduct" as far as all tax exempt organizations are concerned. Such a ruling carried to its logical conclusion would deny tax exempt status to all religious organizations.

In *Moose Lodge*, this Court pointed out that the scrutinized Pennsylvania statutes did not encourage discrimination.²⁷

²⁶ Current newspapers and periodicals are filled with stories of the financial woes of private schools and colleges operating with tax exempt status.

²⁷ An exception was noted which is not pertinent here.

There is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination. 407 U. S. p. 163.

Similarly, by granting tax exempt status to educational institutions, including religious schools such as the University, the Internal Revenue Service does not encourage discrimination. Even-handed granting of tax exempt status simply allows religious institutions to practice their religious beliefs whether or not discrimination is involved. On the other hand, the course elected by the government produces a discriminatory and chilling effect upon First Amendment rights.

D. Is the threatened revocation of the University's tax exempt status in violation of the Fifth Amendment to the Constitution in that it would deny the University due process and equal protection of the law?

The threatened revocation of the University's tax exempt status is not only unconstitutional inhibition of its religious beliefs and practices but is also discriminatory, and thus denies the University the equal protection of the laws. The Equal Protection provisions of the Fourteenth Amendment are applicable to the federal government through Due Process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U. S. 497.

The University is denied equal protection, as the threatened action favors those religious organizations which will continue to enjoy tax exempt status where their particular religious beliefs allow adoption of a racially non-discriminatory admissions policy. This unconstitutional discrimination can be easily seen if one imagines two religious schools identical in purpose and administration but for one difference, *i.e.*, the first has religious beliefs which require the separation of the races and thus a racially dis-

criminatory admissions policy, while the second does not. To tax the first and exempt the second, requires the federal government to choose between these two religions and favor one, which favoritism is constitutionally forbidden.

Such uneven treatment of religions involves serious establishment questions attendant to those involving due process and equal protection. The mere fact that government actions tend to cross the establishment line in selected religions necessarily creates equal protection problem. Conversely a denial of equal protection among religions necessarily gives rise to establishment questions.

This Court has consistently struggled to find a neutral course between the two religion clauses contained in the First Amendment. Thus, the opinions of the Supreme Court have developed the "benevolent neutrality" doctrine, *Walz, supra*. Because of the possible conflict between the two religion clauses, and in furtherance of the doctrine of benevolent neutrality, the Supreme Court has held that a grant by the federal or state government of a tax exemption violates neither of the religion clauses, *i. e.*, it does not constitute the establishment of a religion, nor does it interfere with religious freedoms. Historically, proper constitutional construction and proper legislative actions have demanded tax exemption for religious organizations so that they should not be inhibited in their activities by taxation.

Analogy can be drawn from the Court's decisions in the "Bible reading" cases. *Abington v. Schempp, supra*. There, the Court again encountered the tension in its construction of the "establishment" and "freedom" clauses. The Court said:

... a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose

his own course with reference thereto, free of any compulsion by the state. 374 U. S. p. 222.

Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a Free Exercise case for one to show the coercive effect of the enactment as it operated against him in the practice of his religion. 374 U. S. p. 223.

We agree of course that the state may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus prefessing those who believe in no religion over those who do believe. 374 U. S. p. 225.

Mr. Justice Brennan, in concurring with the judgment of the Court in *Schempp* as to meaning of the protection of religion against state action said:

The choice which is thus preserved (by the First Amendment) is between a public secular education with its uniquely democratic values and some form of private sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice of diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardising the freedom of the public schools from private or sectarian pressure. 374 U. S. p. 242.

Further analogy can be drawn from *Board of Education v. Allen*, *supra*, which involved a New York statute requiring local school districts to purchase and lend school books to the parochial school students as well as those in public school. The court sustained the constitutionality of the statute by finding that religion and secular education were not so intertwined as to demand a finding that the provision of textbooks on secular matters by the state amounted to an establishment of religion.

The first aspect of *Allen* that is material to the case for public support for private religious schools is the holding that the state, which cannot establish a religion cannot inhibit religion. Referring to the series of cases already discussed, the Court said in *Allen*:

The case of *Abington v. Schëmp* . . . fashioned a text subscribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contracts which the Establishment Clause permits.

The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative powers as circumscribed by the Constitution. That is to say to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Emerson v. Board of Education. 392 U. S. p. 243.

Here the appellants would not only destroy the balance sought between secular and sectarian education but would create imbalance and governmental discrimination within sectarian education itself. Such is clearly unconstitutional.

CONCLUSION

Jurisdictional limitations should not be applied to exempt organizations where irreparable harm automatically results. The Anti-Injunction Statute as applied by the Court of Appeals raises substantial question as to the propriety of its use as well as its constitutionality. The *Williams Packing* test should be construed or enlarged so as to permit meaningful judicial relief for threatened exempt organizations.

The University has raised significant statutory and constitutional issues which require reversal of the Court

of Appeals. Its well established, long standing beliefs and practices are entitled to constitutional protection. The statutory scheme providing for exemption commands exemption for the University.

"There is little doubt that 'the power to tax involves the power to destroy.' Since private schools . . . cannot be destroyed directly, they should not be eliminated indirectly. If integrated education is as desirable as most people believe, its advantages will become self evident and schools presently practicing racial discrimination will cast aside their prejudicial policies of their own volition. Until such time, however, the constitutional right of these institutions to exist must be protected. Confidence in the American system and toleration of differing points of view command such a course."²⁸

By continuing to recognize the University as exempt from federal taxes, the government does nothing to perpetuate the University and its religious beliefs and practices. The future of the University is predicated upon continuing support from its contributors and continuing attendance by its students. Even with its tax exempt status intact, it cannot survive unless, in the free marketplace of ideas, it is able to attract support. It should not be crippled in its attempt to survive. It should have the same opportunity to compete for contributions and students as do all other religious schools.

For the reasons stated, it is respectfully submitted that the decision of the Court of Appeals should be reversed and

²⁸ *Charitable Deductions, Tax Exemption and Segregated Institutions*, 23 Syracuse L. Rev. 1189, 1210. Footnotes omitted.

the case remanded for entry of a permanent injunction enjoining revocation of the University's tax exempt status.

RESPECTFULLY SUBMITTED.

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DISTRIB

JAN 2 1974

Nos. 72-1470, 72-1371

JAN 2 1

MICHAEL ROSEN, J.

In the Supreme Court of the United States
OCTOBER TERM, 1973

BOB JONES UNIVERSITY, PETITIONER

v.

**GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF
THE UNITED STATES, AND DONALD C. ALEXANDER,
COMMISSIONER OF INTERNAL REVENUE**

**DONALD C. ALEXANDER, COMMISSIONER OF
INTERNAL REVENUE, PETITIONER**

v.

"AMERICANS UNITED" INC., ETC., ET AL.

**ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE FOURTH AND
DISTRICT OF COLUMBIA CIRCUITS**

**BRIEF FOR THE RESPONDENTS IN NO. 72-1470 AND
REPLY BRIEF FOR THE PETITIONER IN NO. 72-1371**

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutory provisions involved	3
Statement	3
Summary of argument	10
Argument	15
The courts have no jurisdiction to entertain suits for injunctive and declaratory relief respecting the Commissioner's revocation of rulings determining tax-exempt status and deductibility of contributions	15
A. Bob Jones University's suit was barred by the Anti-Injunction Act....	15
1. Judicial review of tax decisions is available only within the statutory scheme provided by Congress	15
2. Bob Jones University's suit for injunctive relief is prohibited by the express terms of the Anti-Injunction Act	20
3. The proposed revocation of Bob Jones University's tax ruling because of its racially discriminatory admissions policy is not a case in which it is clear that under no circumstances could the government prevail on the merits of its claim	29

Argument—Continued	Page
B. Both Americans United and Bob Jones University have adequate legal means to litigate their eligibility for exempt status and tax deductible contributions	33
Conclusion	41
Appendix A	42

CITATIONS

Cases:

<i>Alexander v. Americans United</i> , 477 F. 2d 1169, petition for certiorari granted, June 4, 1973, October Term 1973	3
<i>Allen v. Regents</i> , 304 U.S. 439	28, 29
<i>Bailey v. George</i> , 259 U.S. 16	27
<i>Balistrieri v. United States</i> , 303 F. 2d 617	24
<i>Brewster v. United States</i> , 423 F. 2d 1061	24
<i>Brown v. Board of Education</i> , 347 U.S. 483	31
<i>Calkins v. Smietanka</i> , 240 Fed. 138	25
<i>Campbell v. Guetorsloh</i> , 287 F. 2d 878	24
<i>Cattle Feeders Tax Committee v. Shultz</i> , decided December 6, 1973	39
<i>Cheatham v. United States</i> , 92 U.S. 85	16
<i>Chester v. Ross</i> , 231 F. Supp. 23, affirmed per curiam 351 F. 2d 949	25
<i>Child Labor Tax Case</i> , 259 U.S. 20	27
<i>Church of Scientology of Hawaii v. United States</i> , 485 F. 2d 313	36
<i>Commissioner v. Gordon</i> , 391 U.S. 83	39

Cases—Continued

Page

<i>Commonwealth of Pennsylvania v. Brown</i> , 392 F. 2d 120, certiorari denied, 391 U.S. 921	31
<i>Connecticut Bank and Tr. Co. v. Johnson Memorial Hospital</i> , 30 Conn. Supp. 1, 294 A. 2d 586	31
<i>Czieslik v. Burnet</i> , 57 F. 2d 715	25
<i>Eastern Kentucky Welfare Rights Organ- ization v. Shultz</i> , (D. D.C.) Civil No. 1378-71, decided December 20, 1973....	39
<i>Eighth Street Baptist Church v. United States</i> , 431 F. 2d 1193	29
<i>Enochs v. Williams Packing Co.</i> , 370 U.S. 1	10, 13, 14, 15, 17, 18, 19, 20, 21, 24, 28, 33, 35, 36, 37, 38, 41
<i>Evans v. Abney</i> , 396 U.S. 435	31
<i>Fifty-Third Union Trust Co. v. Commis- sioner</i> , 56 F. 2d 767	33
<i>Gehman v. Smith</i> , 76 F. Supp. 805	28
<i>Gouge v. Hart</i> , 250 Fed. 802	25
<i>Graham v. duPont</i> , 262 U.S. 234	29
<i>Green v. Connally</i> , 330 F. Supp. 1150, af- firmed <i>per curiam sub nom. Coit v. Green</i> , 404 U.S. 997	6, 30, 32, 33
<i>Helvering v. Bliss</i> , 293 U.S. 144	30
<i>Helvering v. Davis</i> , 301 U.S. 619	29
<i>Hill v. Wallace</i> , 259 U.S. 44	28, 29
<i>Israelite House of David v. Holden</i> , 14 F. 2d 701	26
<i>Jolles Foundation v. Moysey</i> , 250 F. 2d 166	26
<i>Jules Hairstylists of Maryland v. United States</i> , 268 F. Supp. 511, affirmed <i>per curiam</i> , 389 F. 2d 389, certiorari de- nied, 391 U.S. 934	29

IV

Cases—Continued

Page

<i>Knight v. State of New York</i> , 443 F. 2d 415	23
<i>Koin v. Coyle</i> , 402 F. 2d 468	24
<i>Kyron Foundation, Inc. v. Dunlap</i> , 110 F. Supp. 428	26
<i>Lassoff v. Gray</i> , 266 F. 2d 745	28
<i>Lipke v. Lederer</i> , 259 U.S. 557	28, 29
<i>Miles v. Johnson</i> , 59 Fed. 38	25
<i>Miller v. Nut Margarine Co.</i> , 284 U.S. 498	18, 28
<i>Mitchell v. Riddell</i> , 402 F. 2d 842, appeal dismissed and certiorari denied, 394 U.S. 456	26, 35, 36
<i>McAlister v. Cohen</i> , 436 F. 2d 422	28
<i>National Council on the Facts of Overpopulation v. Caplin</i> , 224 F. Supp. 313	24, 26
<i>Norwood v. Harrison</i> , No. 72-77, October Term, 1972 (decided June 25, 1973) ..	31, 32
<i>Ould v. Washington Hospital for Foundlings</i> , 95 U.S. 303	31
<i>Ralston v. Heiner</i> , 21 F. 2d 494, affirmed 24 F. 2d 416, certiorari denied, 277 U.S. 608	25
<i>Reamis v. Vroorman-Fehn Printing Co.</i> , 140 F. 2d 237	29
<i>Scaife, William B., & Sons Co. v. Driscoll</i> , 94 F. 2d 664, certiorari denied, 305 U.S. 663	24
<i>Singleton v. Mathis</i> , 284 F. 2d 616	28
<i>Snyder v. Marks</i> , 109 U.S. 189	16
<i>Sonzinsky v. United States</i> , 300 U.S. 506	27
<i>State Railroad Tax Cases</i> , 92 U.S. 575	16

Cases—Continued

	Page
<i>Tank Truck Rentals, Inc. v. Commissioner</i> , 356 U.S. 30	32
<i>Tomlinson v. Poller</i> , 220 F. 2d 308	25
<i>United States v. Butler</i> , 297 U.S. 1	27
<i>Vasilinda v. United States</i> (C.A. 5, No. 71-1802), decided November 12, 1973	28
<i>Wachovia Bank & Trust Co., N.A. v. Buchanan</i> , 346 F. Supp. 665	31
<i>Wahpeton Professional Services, P.C. v. Kniskern</i> , 275 F. Supp. 806	24
<i>Wells v. Campbell</i> , 113 F. Supp. 928	28
<i>West Chester Feed & Supply Co. v. Erwin</i> , 438 F. 2d 929	24
<i>Zamaroni v. Philpott</i> , 346 F. 2d 365	24
<i>Zapata v. Smith</i> , 437 F. 2d 1024	23

Statutes:

Act of September 2, 1789, c. 12, 1 Stat. 65	16
Civil Rights Act of 1964, Sec. 601, 78 Stat. 252, 42 U.S.C. 2000d	5, 31
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 103	40
Sec. 170(a)	3, 30
Sec. 170(c)	21, 30
Sec. 216	40
Sec. 501(c)	2, 19, 21, 29, 33, 34, 36
Sec. 851-855	40
Sec. 3306(c)	21
Sec. 6212	16
Sec. 6213	16
Sec. 6532	17
Sec. 6861	16

IV

Cases—Continued

	Page
<i>Knight v. State of New York</i> , 443 F. 2d 415	23
<i>Koin v. Coyle</i> , 402 F. 2d 468	24
<i>Kyron Foundation, Inc. v. Dunlap</i> , 110 F. Supp. 428	26
<i>Lassoff v. Gray</i> , 266 F. 2d 745	28
<i>Lipke v. Lederer</i> , 259 U.S. 557	28, 29
<i>Miles v. Johnson</i> , 59 Fed. 38	25
<i>Miller v. Nut Margarine Co.</i> , 284 U.S. 498	18, 28
<i>Mitchell v. Riddell</i> , 402 F. 2d 842, appeal dismissed and certiorari denied, 394 U.S. 456	26, 35, 36
<i>McAlister v. Cohen</i> , 436 F. 2d 422	28
<i>National Council on the Facts of Overpopulation v. Caplin</i> , 224 F. Supp. 313	24, 26
<i>Norwood v. Harrison</i> , No. 72-77, October Term, 1972 (decided June 25, 1973) ..	31, 32
<i>Ould v. Washington Hospital for Foundlings</i> , 95 U.S. 303	31
<i>Ralston v. Heiner</i> , 21 F. 2d 494, affirmed 24 F. 2d 416, certiorari denied, 277 U.S. 608	25
<i>Reamis v. Vroorman-Fehn Printing Co.</i> , 140 F. 2d 237	29
<i>Scaife, William B., & Sons Co. v. Driscoll</i> , 94 F. 2d 664, certiorari denied, 305 U.S. 663	24
<i>Singleton v. Mathis</i> , 284 F. 2d 616	28
<i>Snyder v. Marks</i> , 109 U.S. 189	16
<i>Sonzinsky v. United States</i> , 300 U.S. 506	27
<i>State Railroad Tax Cases</i> , 92 U.S. 575	16

Cases—Continued

Page

<i>Tank Truck Rentals, Inc. v. Commissioner</i> , 356 U.S. 30	32
<i>Tomlinson v. Poller</i> , 220 F. 2d 308	25
<i>United States v. Butler</i> , 297 U.S. 1	27
<i>Vasilinda v. United States</i> (C.A. 5, No. 71-1802), decided November 12, 1973	28
<i>Wachovia Bank & Trust Co., N.A. v. Buchanan</i> , 346 F. Supp. 665	31
<i>Wahpeton Professional Services, P.C. v. Kniskern</i> , 275 F. Supp. 806	24
<i>Wells v. Campbell</i> , 113 F. Supp. 928	28
<i>West Chester Feed & Supply Co. v. Erwin</i> , 438 F. 2d 929	24
<i>Zamaroni v. Philpott</i> , 346 F. 2d 365	24
<i>Zapata v. Smith</i> , 437 F. 2d 1024	23

Statutes:

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Civil Rights Act of 1964, Sec. 601, 78 Stat. 252, 42 U.S.C. 2000d	5, 31
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Sec. 103	40
Sec. 170(a)	3, 30
Sec. 170(c)	21, 30
Sec. 216	40
Sec. 501(c)	2, 19, 21, 29, 33, 34, 36
Sec. 851-855	40
Sec. 3306(c)	21
Sec. 6212	16
Sec. 6213	16
Sec. 6532	17
Sec. 6861	16

Statutes—Continued	Page
Sec. 7421	3, 15
Sec. 7422	17
28 U.S.C.:	
Sec. 1340	37
Sec. 1341	35, 36
Sec. 1346	17
Sec. 1491	17
Sec. 2201	3, 19
Sec. 2202	3, 19
31 U.S.C. 1002	16
45 C.F.R. § 80.4	5
50 Cong. Rec. 1259	30
55 Cong. Rec. 6728-6729, 6741	30
Department of Health, Education and Welfare, Status of Title VI Compliance Interagency Report, Cum. List. No. 296 (November 1, 1973)	5-6
Federal Tax Benefits to Segregated Pri- vate Schools, 68 Col. L. Rev. 922	30
H. Rep. No. 1860, 75th Cong., 3d Sess. (1939-1 Cum. Bull. (Part 2) 728	30
Reiling, <i>Federal Taxation: What is a Charitable Organization?</i> , 44 A.B.A.J. 525	30
Restatement of Trusts 2d, Sec. 377	31
Rev. Proc. 68-17, 1968-1 Cum. Bull. 806	9
Rev. Proc. 69-3, 1969-1 Cum. Bull. 389	9
Rev. Proc. 72-4, 1972-1 Cum. Bull. 706	9
Rev. Proc. 72-39, 1972-2 Cum. Bull. 818	9
Rev. Proc. 73-29, 1973-40 I.R.B. 18	33
Rev. Rul. 67-325, 1967-2 Cum. Bull. 113	30
Rev. Rul. 71-447, 1971-2 Cum. Bull. 230	6

VII

Miscellaneous:

Page

T.I.R. 1261, 1973 CCH Stand. Fed. Tax Rep., Par. 6951	39
Weil, <i>Tax Exemptions for Racial Dis- crimination in Education</i> , 23 Tax L. Rev. 399	30

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1470

BOB JONES UNIVERSITY, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF
THE UNITED STATES, AND DONALD C. ALEXANDER,
COMMISSIONER OF INTERNAL REVENUE

No. 72-1371

DONALD C. ALEXANDER, COMMISSIONER OF
INTERNAL REVENUE, PETITIONER

v.

"AMERICANS UNITED" INC., ETC., ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE FOURTH AND
DISTRICT OF COLUMBIA CIRCUITS*

**BRIEF FOR THE RESPONDENTS IN NO. 72-1470 AND
REPLY BRIEF FOR THE PETITIONER IN NO. 72-1371**

OPINIONS BELOW

The findings of fact, conclusions of law, and preliminary injunction order of the district court (App. A114-A129)¹ are reported at 341 F. Supp. 277. The opinion of the court of appeals (App. A132-A140) is reported at 472 F. 2d 903. The opinion of the court of appeals denying rehearing (App. A150-A151) is reported at 476 F. 2d 259.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1973.² Petitioner's petition for rehearing *en banc* was denied on March 21, 1973 (App. A150-A151). The petition for a writ of certiorari was filed on April 30, 1973, and was granted on October 9, 1973.³ The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner is a non-profit private sectarian university which does not admit black students. In 1942, the Internal Revenue Service had given it an advance ruling that petitioner was exempt from income tax pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954 and assuring that gifts to it would

¹ "App." references are to the record appendix filed by petitioner in No. 72-1470.

² The judgment was not included in the record appendix.

³ The order granting the writ of certiorari was not included in the record appendix.

be deductible as charitable contributions under Section 170(a). In 1971, the Commissioner proposed to withdraw this ruling because of petitioner's racially discriminatory admissions policy. The question presented is:

Whether petitioner is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and the Declaratory Judgment Act, 28 U.S.C. 2201-2202, from obtaining injunctive or declaratory relief restraining the Commissioner from withdrawing the ruling respecting petitioner's tax-exempt status and deductibility of contributions made to it.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Internal Revenue Code, including the Anti-Injunction Act, and the Declaratory Judgment Act, are set forth in Appendix A, *infra*, pp. 42-46.

STATEMENT

This case and *Alexander v. Americans United, Inc.*, No. 72-1371, October Term, 1973, present the identical question whether the Anti-Injunction and Declaratory Judgment Acts bar suits to restrain the Internal Revenue Service's withdrawal of rulings recognizing tax exempt status and eligibility for tax deductible contributions. Because of the common issue in both cases, the Court has scheduled oral arguments in this case in tandem with that in No. 72-1371. In order that the Court may consider the single legal issue involved in the factual context of both cases, this

document contains both the brief for the respondents in No. 73-1470 and the reply brief for the petitioner in No. 72-1371. Although the statement of facts set forth below concerns only petitioner Bob Jones University, we will present argument here with respect to both cases.⁴

Petitioner is an eleemosynary South Carolina Corporation engaged in religious and educational activities in Greenville, South Carolina. It has chosen the field of education, principally at the college level, as the vehicle for teaching and propagating its fundamentalistic religious beliefs (App. A5, A114-A115). As stated in its charter (App. A115), petitioner's purposes are to "conduct an institution of learning for the general education of youth * * * giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures [and] combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel * * *."⁵

⁴ A copy of the government's opening brief filed in No. 72-1371 and the record appendix in that case will be served on petitioner Bob Jones University, together with this brief. "R." references are to the record appendix in No. 72-1371.

⁵ In order to achieve its stated purposes, petitioner requires its students to attend daily chapel services. All classes and meetings held begin and end with prayers. Most students are required to enroll in one religion class each semester. All faculty members are required to teach and adhere to the religious beliefs and principles of the school, and any member of the faculty or student body who teaches or promotes religious beliefs to the contrary is subject to dismissal (App. A116).

One of petitioner's religious beliefs is that God intended the various races of men to live separate and apart, and that intermarriage of different races is contrary to God's will and the Scriptures⁶ (App. A5, A16, A115). In keeping with its belief, petitioner has refused to admit unmarried blacks as students in the University. No student is permitted to date or marry outside his own race⁷ and petitioner believes that it would be impossible to enforce this rule if it were to adopt a racially non-discriminatory admissions policy (App. A64-A65, A115-A116).⁸

⁶ The affidavit of petitioner's president, Dr. Bob Jones III, and the attached sermon, "Is Segregation Scriptural?", presents a detailed explanation of this belief (App. A14-A37).

⁷ Petitioner's president explained the connection between its racially discriminatory admissions policy and interracial dating and marriage, as follows (App. A64):

We accept a few Oriental students, but we do so with a definite understanding that they will not date outside of their own race. If we took Negro students here on this same basis today, they would resent that restriction and would cry that they were being discriminated against because they were not allowed to date Orientals or Caucasians. If we had to expel a black student today for the worst possible offense—stealing, attempted rape, or something of that sort—he would cry that he was being persecuted because he was black; and we would be picketed, annoyed, and harassed.

⁸ A further consequence of petitioner's discriminatory admissions policy is its ineligibility, since August 26, 1968, to receive grants from the federal government because it has refused to sign the Statement of Compliance prescribed by Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d and 45 C.F.R. § 80.4(d) (1). Dept. of Health, Education, and

Since 1942, the Internal Revenue Service had determined that petitioner and its predecessor organization Bob Jones College were eligible for tax-exempt status and could receive tax-deductible contributions. On July 10, 1970, however, the Internal Revenue Service announced publicly that it could no longer legally justify its prior allowance of tax-exempt status to private schools maintaining racially discriminatory admissions policies nor could it continue to treat gifts to such schools as deductible charitable contributions for income tax purposes (App. A39-A40, A133). This action was taken after an intensive study of the question by the Department of Justice and of the Treasury Department (App. A81).⁹

Welfare, *Status of Title VI Compliance Interagency Report*, Cum. List No. 296 (Nov. 1, 1973), p. 4. In addition, petitioner is presently challenging the action of the Veterans Administration terminating tuition and other payments to veterans attending Bob Jones University on the ground of its racially discriminatory policies. *Bob Jones University v. Johnson*, Civil No. 72-1325 (D. S.C.).

⁹ As a result of this change in policy, which was formally published in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, the Internal Revenue Service did not appeal from the order of a three-judge district court in *Green v. Connally*, 330 F. Supp. 1150 (D. D.C.), prohibiting the issuance of tax-exempt status and deductibility of contributions with respect to private schools in Mississippi maintaining racially discriminatory admissions policies. That suit had been brought by a group of Mississippi black parents and their children. In response to an appeal of the decision by a group of white intervenors seeking reversal by this Court on First Amendment freedom of association grounds, the government filed a motion to dismiss. This Court affirmed without opinion. *Coit v. Green*, 404 U.S. 997.

On November 30, 1970, the Internal Revenue Service sent a letter of inquiry to each private school in the United States, including petitioner, which had an individual tax-exemption ruling. The letter announced that the Internal Revenue Service's position is that private schools with racially discriminatory admissions policies are not legally entitled to tax exemption and that contributions to such schools are not deductible as charitable contributions. The letter stated that all rulings and determinations issued to private schools would be reviewed in light of this position. Each school was therefore asked to furnish specific information regarding its admissions policy within thirty days (App. A37-A39, A52).¹⁰ On December 30, 1970, petitioner advised the Internal Revenue Service that it did not admit black students (App. A56-A59).

During the next nine months, petitioner's attorneys met and communicated with various high officials of the Internal Revenue Service, including the Commissioner, Randolph W. Thrower, and his successor, Johnnie M. Walters.¹¹ Throughout this period, pe-

¹⁰ On December 9, 1970, after receipt of the letter of inquiry from the Internal Revenue Service, petitioner advised its contributors that it was going to "stall" responding to the request for information concerning its racial policies as long as possible. It urgently asked its contributors to make the largest possible donations in order to avail themselves of the deductibility assurance before it was withdrawn (App. A62).

¹¹ At a meeting with officials of the Internal Revenue Service on April 21, 1971, petitioner's representatives sought and obtained additional time in which to confer with University officials respecting a possible change in the admissions policy

petitioner refused to change its racially discriminatory admissions policies and the Internal Revenue Service adhered to its view that such practices precluded tax-exempt status. These discussions terminated in early September 1971, when petitioner notified the Commissioner that it did not intend to alter its racially discriminatory admissions policy (App. A52-A53).

The Commissioner thereupon determined to instruct the District Director to commence the administrative procedures which are followed by the Internal Revenue Service when the tax-exempt status of an organization is called into question. Those procedures allow the organization an opportunity to confer with the staff of the District Director and, if necessary, to file a written protest. The organization is also permitted to confer with officials of the Internal Revenue Service at the National Office in Washington before any final decision is made. Prior to a final decision, the Internal Revenue Service will not conduct an audit of an organization's records or issue

(App. A46). On July 29, 1971, petitioner's attorney advised an assistant to the Commissioner that the admissions policy would not be changed. Nevertheless, he sought and obtained an additional conference with the Internal Revenue Service. On September 8, 1971, Commissioner Walters personally met with petitioner's attorneys and advised them that he intended to instruct the District Director to begin the formal administrative proceedings for the purpose of determining whether to withdraw the tax exemption and deductibility assurance ruling (App. A47-A49, A52-A54, A117).

any notice of proposed deficiency either against the organization or a contributor.¹²

Before these administrative procedures could be initiated, however, petitioner brought this action on September 9, 1971, seeking a preliminary and final injunction restraining the Commissioner from withdrawing the ruling with respect to its tax-exempt status and deductibility of contributions made to it (App. A52-A53).¹³ The immediate effect of this suit was to preclude the application of the above-described administrative procedures (App. A7).

The district court granted petitioner's request for injunctive relief *pendente lite* (App. A128-A129). The district court ruled that the diminution of contributions following withdrawal of the ruling with respect to their deductibility would cause petitioner irreparable injury. The Court held that the Anti-Injunction Act, which prohibits suits "for the purpose of restraining the assessment or collection of any tax," was not applicable because, *inter alia*, the suit challenged the constitutionality, rather than the ap-

¹² A detailed description of these procedures is set forth in Rev. Proc. 69-3, 1969-1 Cum. Bull. 389, which has been superseded by Rev. Proc. 72-4, 1972-1 Cum. Bull. 706 (tax exemption), and Rev. Proc. 68-17, 1968-1 Cum. Bull. 806, now superseded by Rev. Proc. 72-39, 1972-2 Cum. Bull. 818 (deductibility assurance).

¹³ If the District Director had been instructed to commence the prescribed administrative procedures, the affidavit of William H. Connett, Assistant to the Commissioner of Internal Revenue, describes how they would have been applied with respect to petitioner (App. A53-A56).

plicability of the non-discrimination requirement. (App. A121-A128).

The court of appeals reversed, concluding that the Anti-Injunction Act barred the suit, notwithstanding the acknowledged injury which would result from the withdrawal of petitioner's ruling with respect to deductibility of contributions (App. A134-A138).

SUMMARY OF ARGUMENT

A

Two acts of Congress, the Anti-Injunction Act and the Declaratory Judgment Act, have recognized that the prompt and efficient collection of the federal revenues is a paramount national concern. These statutes respectively prohibit the federal courts from granting injunctions against the assessment or collection of taxes or declaratory relief with respect to federal taxes. As this Court has observed, such statutes reflect the desire of Congress to avoid the possibility that the courts could interfere with the orderly process of collecting the revenues upon which the government depends for its continued existence.

One narrow exception, created by a decision of this Court, exists to the otherwise broad restriction against injunctive relief in federal tax cases. In *Enochs v. Williams Packing Co.*, 370 U.S. 1, the Court unanimously held that a taxpayer seeking an injunction against the collection of taxes must satisfy a twofold test. First, he had to demonstrate that under no circumstances could the government prevail on the merits of its claim. Secondly, he must show

that collection of the tax will result in an irreparable injury for which there is no adequate legal remedy.

It is against this deeply rooted policy of barring the federal courts from exercising their equity powers to encroach upon the administrative determination process necessary for revenue collection that this case and its companion in No. 72-1371 must be viewed. In 1942, the Internal Revenue Service had determined that Bob Jones University and its predecessor organization were eligible for tax-exempt status and could receive tax-deductible contributions. In 1970, however, the Internal Revenue Service, after an intensive study of the question, announced that it could no longer legally justify its prior allowance of such tax treatment to private schools maintaining racially discriminatory admissions policies.

In response to a formal inquiry by the Internal Revenue Service, Bob Jones University stated that it did not and would not admit blacks as students. During repeated conferences between representatives of the University and high officials of the Internal Revenue Service, the University refused to alter its racially discriminatory policy. Despite this firmly stated position by the University, the Internal Revenue Service was nevertheless prepared to follow its prescribed administrative procedures providing for still additional conferences prior to making a final decision with respect to the withdrawal of the ruling. Before the Internal Revenue Service could invoke this procedure, however, the University commenced its suit to restrain the Commissioner from withdrawing the ruling.

The Anti-Injunction Act bars this suit. The Act bars any suit "for the purpose of restraining the assessment or collection of any tax * * *." This is such a suit because any restraint upon the Commissioner's withdrawal of a ruling granting tax-exempt status and eligibility to receive deductible contributions will prevent the assessment of taxes against the recipient organization and its donors who have claimed deductions for charitable contributions. Indeed, the operation of the injunction of the district court had that very effect in this case.

The University, however, claims that this is not a tax case but the use of the taxing power to force it to alter its racially discriminatory admissions policy. But that contention ignores the undisputed fact that the taxes which would have been assessed and collected are income and unemployment taxes, plainly revenue producing in character. Moreover, for purposes of the Anti-Injunction Act, this Court has held that there is no distinction between revenue-producing taxes and those levies which are arguably regulatory.

The position of the Internal Revenue Service that private schools which maintain racially discriminatory admissions policies are ineligible for tax-exempt status is amply supported by decisions of this Court and Acts of Congress evidencing a strong national policy against segregation in public education and prohibiting governmental assistance to private institutions which maintain exclusionary policies based upon race. Moreover, a three-judge district court has specifically held that private schools which, like Bob Jones Uni-

versity, exclude blacks from enrollment, are not eligible for tax-exempt status or to receive deductible contributions. While the correctness of this conclusion appears inescapable, the merits of the Internal Revenue Service's policy with respect to discriminatory private schools is not at issue here. In light of the authorities, however, the University cannot demonstrate that under no circumstances would the government prevail on the merits of its claim pursuant to the first aspect of the *Williams Packing* test. On this basis, the Fourth Circuit correctly refused to enjoin the Commissioner from withdrawing the University's ruling.

B

Although the Fourth Circuit did not reach the question whether the University had adequate legal means to challenge the Commissioner's proposed action, there were three legal remedies available. These were a ~~refund suit for unemployment (F.U.T.A.) taxes~~, a refund suit by the University for unemployment (F.U.T.A.) taxes, a refund or a Tax Court suit by the University with respect to income taxes, and an action by a contributor either in a refund or a Tax Court suit to test his right to a deduction for a charitable contribution. Such proceedings are all fully adequate methods to obtain judicial review of the question.

That organizations such as the University and Americans United may suffer a decrease in contributions from a revocation of their tax-exempt status is a consequence of the fact that litigation does not

instantly resolve these questions. In light of the policy of the Anti-Injunction and Declaratory Judgment Acts to protect the revenue collection process, it seems highly unlikely that the Congress intended organizations such as the University and Americans United to preserve their tax benefits and those of their contributors *pendente lite*. But the preliminary relief sought by both of these organizations would have this effect in derogation of the revenue. As this Court observed in *Williams Packing*, where the taxpayer similarly could not demonstrate that under no circumstances would the government prevail, such injunctive suits "may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6).

Finally, when viewed against the background of the entire rulings program of the Internal Revenue Service, there is little justification for allowing injunctive relief with respect to questions involving exempt status and deductibility of contributions. The congressional policy against injunctions is equally applicable to all federal tax controversies. If the courts could grant injunctive relief with respect to the issuance or withdrawal of such rulings, it would seriously impair the administration of the entire rulings program in which the Internal Revenue Service issues decisions on the tax consequences of a wide variety of transactions. Judicial intervention would eliminate the necessary discretion which must be exercised if the rulings program is to be effective. The rationale of the District of Columbia Circuit's

modification to the *Williams Packing* standard cannot be logically limited to questions involving tax-exempt status rulings. Hence, it threatens the continued effectiveness of the entire rulings program of the Internal Revenue Service. If changes of such a fundamental character in the administration of the tax laws and the *Williams Packing* rule are to be forthcoming, they should be made by Congress and not by the courts.

ARGUMENT

THE COURTS HAVE NO JURISDICTION TO ENTERTAIN SUITS FOR INJUNCTIVE AND DECLARATORY RELIEF RESPECTING THE COMMISSIONER'S REVOCATION OF RULINGS DETERMINING TAX-EXEMPT STATUS AND DEDUCTIBILITY OF CONTRIBUTIONS.

A. Bob Jones University's suit was barred by the Anti-Injunction Act.

1. *Judicial review of tax decisions is available only within the statutory scheme provided by Congress.*

The federal Anti-Injunction Act provides, with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867¹⁴ in order to prevent the same type of injunctive suits which had swept over the state taxation systems from similarly inundating the federal tax system. This Court thereafter recognized the congressional policy which underlay the passage of the Act, namely, that

¹⁴ The statute originated as Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, and is now codified as Section 7421 (a) of the Internal Revenue Code of 1954.

if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government would be threatened. See *State Railroad Tax Cases*, 92 U.S. 575, 613; *Cheatham v. United States*, 92 U.S. 85, 89; *Snyder v. Marks*, 109 U.S. 189, 193-194.¹⁵ The barring of such suits is necessary to enable the Treasury Department effectively to discharge its duty of "superintend[ing] the collection of the revenue * * *" which the First Congress delegated to it.¹⁶ This includes a wide variety of administrative acts, including the acceptance of tax returns for filing, audits of returns, and promulgation of regulations and revenue rulings.

While Congress has foreclosed injunctive actions to restrain the assessment and collection of taxes, it has established a statutory scheme which generally provides taxpayers with two methods of obtaining judicial review of certain types of actions taken by the Treasury. First, with respect to income, estate and gift taxes, a taxpayer may obtain review of a notice of deficiency without having to pay the disputed amount by filing a timely petition in the Tax Court. Sections 6212 and 6213 of the Internal Revenue Code of 1954.¹⁷ Alternatively, a taxpayer may

¹⁵ These cases and the historical background of judicial review in tax cases are discussed in greater detail at pp. 13-17 in our brief in No. 72-1371.

¹⁶ Act of September 2, 1789, c. 12, 1 Stat. 65. See currently, Revised Statutes § 248 (31 U.S.C. 1002).

¹⁷ The existence of the Tax Court review procedure does not conflict with the government's fundamental right to assess and collect taxes prior to litigation. Under the jeopardy assessment procedures of Section 6861, the Commissioner

pay the disputed amount of any type of tax, file a claim for refund, and obtain judicial review of the Treasury's denial of the claim (or its failure to act on the claim within six months) by a suit for refund in a district court or in the Court of Claims. Sections 6532 and 7422 of the Code; 28 U.S.C. 1346 and 1491.

These statutory methods of judicial review provide a workable system for the courts to resolve tax controversies between taxpayers and the government. Common to both methods, however, is the requirement that there be a concrete dispute over a specific amount of money, either by way of deficiency or claimed refund. The system does not comprehend the judicial resolution of abstract tax controversies in advance of an assertion by the Treasury against a taxpayer that a particular amount is owed.

The statutory prohibition on injunctions against tax assessment or collection activities by the Treasury is subject to one narrowly limited exception created by this Court. In *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7, the Court unanimously held that a taxpayer might obtain an injunction against assessment or collection of taxes only if he satisfied a two-fold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; secondly, he must show that "equity jurisdiction

may assess and collect taxes at any time before or during Tax Court proceedings if he "believes that the assessment or collection * * * will be jeopardized by delay * * *."

otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy.¹⁸ The applicability of that exception is at issue here.

Williams Packing held that a claim of irreparable injury, without more, cannot justify injunctive relief, preliminary or otherwise, against the assessment and collection activities of the Treasury. There, the taxpayer sought an injunction against the collection of social security and unemployment taxes claimed by the Internal Revenue Service to be past due. The taxpayer asserted that collection of the taxes would cause it irreparable injury. The Court, however, held that "such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6). It observed that the manifest purpose of the Anti-Injunction Act is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal rights to the disputed sums be determined in a suit for refund" (370 U.S. at 7).

Because the record revealed that "the Government's claim of liability was not without foundation" (370 U.S. at 8), there was no need for the Court to determine whether a refund suit presented taxpayer with an adequate legal remedy. No suit for an injunction could be maintained because it was not apparent "under the most liberal view of the law

¹⁸ In *Williams Packing*, the Court clarified the "exceptional circumstances" test announced in *Miller v. Nut Margarine Co.*, 284 U.S. 498.

and the facts, [that] the United States [could] not establish its claim" (370 U.S. at 7).

Similarly, here, it is beyond question that Bob Jones University cannot satisfy the first condition of the twofold *Williams Packing* test. As we shall demonstrate below, it is not clear that under no circumstances the government cannot ultimately prevail in its claim that the University's racially discriminatory policy removes it from the tax-exempt status granted by Code Section 501(c)(3) to organizations "organized and operated exclusively for religious, charitable * * * or educational purposes * * *." Thus, its claim that the proposed withdrawal of its tax ruling will cause it irreparable injury through decreased contributions cannot support a suit for injunctive relief restraining the Commissioner from withdrawing its ruling.

The University's failure to meet this aspect of the *Williams Packing* test is in itself sufficient to bar its suit for injunctive relief and this was the ground of the Fourth Circuit's decision.¹⁹ We shall also show

¹⁹ Although the government argued in the Fourth Circuit that the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201-2202, offered an independent basis for concluding that the courts have no jurisdiction to enjoin the Commissioner with respect to the withdrawal and issuance of tax rulings, the court relied only upon the Anti-Injunction Act. For the reasons set forth at pages 37-42 in our brief in No. 72-1371, we believe that the bar in 28 U.S.C. 2201 against any declaratory suit "with respect to Federal taxes" is an independent statutory prohibition against the type of suit brought by both Bob Jones University and Americans United. Neither of them, however, has made any argument with respect to the

that the University had adequate legal remedies available to challenge the action of the Commissioner.²⁰ There are at least two, and probably three, fully adequate legal means by which the University could have litigated its eligibility for tax deductible contributions. On either basis, therefore, the Commissioner could not be enjoined from withdrawing the tax ruling respecting the University's tax exempt status and deductibility of contributions made to it.

Finally, we submit that there is no basis for expansion of the *Williams Packing* rule to encompass injunctive actions with respect to the rulings of tax-exempt organizations. The policy against allowing the judicial branch to interfere with the orderly collections of revenues is equally applicable to disputes involving claimed exemptions as it is to any other type of tax controversy.

2. *Bob Jones University's suit for injunctive relief is prohibited by the express terms of the Anti-Injunction Act.*

a. Before considering whether Bob Jones University can meet the twofold test established by this

Declaratory Judgment Act except the erroneous contention that the two statutory provisions are coterminous. See our brief in No. 72-1371 at pages 40-42. (See University Br. 13, n. 3; Americans United Br. 6, n. 5). We therefore confine our discussion in this brief to the Anti-Injunction Act.

²⁰ Without considering the legal remedies available to the University, the Fourth Circuit deemed the loss of contributions which would have resulted from the loss of its ruling to be an irreparable injury within the meaning of *Williams Packing* (App. A136).

Court's *Williams Packing* decision, we examine the facts of its case in relation to the statutory language of the Anti-Injunction Act. In 1942, the University (then Bob Jones College) received an advance letter ruling from the Internal Revenue Service advising that it was exempt from income taxes under the predecessor of Code Section 501(c)(3), Appendix, *infra*, pp. 43-44, and that contributions to it would be deductible by the donors under the predecessor of Section 170(c)(2), Appendix, *infra*, pp. 42-43. Since all organizations exempt from tax under Section 501(c)(3) are also exempt from federal unemployment taxes under Code Section 3306(c)(8), Appendix, *infra*, pp. 44-45, the letter ruling necessarily assured the University that it would not be liable for unemployment taxes as well.

In 1971, the Internal Revenue Service proposed to withdraw this letter ruling because of the University's discriminatory admissions policy. This action was the result of a change in policy initiated only after the most intensive study by both the Departments of Justice and the Treasury. Despite the repeated statements made by representatives of the University in numerous preliminary conferences with Internal Revenue Service officials that it refused to alter its racially discriminatory admissions policy, in September, 1971, the Internal Revenue Service was nevertheless prepared to follow the prescribed administrative procedures providing for conferences and receipt of written submissions prior to rendering a final decision respecting the University's tax ruling.

But before these procedures could be commenced, the University initiated this suit for injunctive relief. As a result, the Internal Revenue Service has not yet taken any action altering the University's tax status.²¹

Can it be seriously doubted that the order of the district court was an injunction against "the assessment or collection of any tax" within the meaning of the Anti-Injunction Act? The answer, we submit, is plainly no. Assuming that the Internal Revenue Service had been permitted to pursue its procedures and that the University's ruling had been ultimately withdrawn, contributors to the University would have become liable for income tax deficiency assessments for any charitable deductions taken with respect to contributions made after suspension of the deductibility assurance aspect of the ruling. More-

²¹ Although the court of appeals reversed the district court's order granting a preliminary injunction against the Commissioner (App. A137-A140) and the Chief Justice denied the University's application for a stay of the mandate on April 3, 1973 (App. A156), the district court's order has never been dissolved. On April 2, 1973, the University filed a motion in the district court seeking to prevent the dissolution of the preliminary injunction insofar as it prevented the Internal Revenue Service from suspending the aspect of the ruling assuring the deductibility of contributions. The government opposed this motion on the ground that it was contrary to the mandate of the court of appeals and requested prompt dissolution of the injunction. The district court, however, took no action. On October 12, 1973, it informed the parties that it would not act upon the government's request that the order be formally dissolved because the grant of the writ of certiorari had, in its view, deprived it of any further jurisdiction.

over, the University itself would have become liable for the payment of income taxes²² and federal unemployment taxes. But the preliminary injunction issued by the district court has resulted in unwarranted claims of charitable deductions by the University's contributors as well as the avoidance of tax liability by the University itself.²³ The Internal

²² Most educational institutions operate at a loss and the lack of an exemption from income taxes would not result in any income tax liability. However, the affidavit of the University's accountant states that the federal income tax liability of the University for its taxable years ended May 31, 1971 and May 31, 1972, would have been \$750,000 and in excess of \$500,000, respectively (App. A43-A44).

²³ Because Bob Jones University brought its action for injunctive relief before the Internal Revenue Service could withdraw its tax ruling, it sought to restrain the Commissioner from revocation of the ruling. This relief differs from that sought by Americans United, whose ruling had already been revoked by the Internal Revenue Service. As a result, that organization sued to have its ruling reinstated. Since Americans United asked for affirmative action by the Commissioner, the government raised the defense of sovereign immunity, discussed at pages 42-49 of our brief in No. 72-1371.

This defense is not available against Bob Jones University because it did not seek affirmative action by the Commissioner but simply a prohibitory order against the withdrawal of its ruling. This distinction, while relevant for purposes of sovereign immunity (see *Knight v. State of New York*, 443 F. 2d 415, 420-421 (C.A. 2) and *Zapata v. Smith*, 437 F. 2d 1024 (C.A. 5)), does not, as Americans United suggests (Br. 41-42), minimize the conflict between the circuits in the two cases with respect to the substantive issue of the availability of injunctive relief.

Moreover, the University erroneously relies (Br. 30) upon the sovereign immunity cases as a basis for its suit on the ground that the Commissioner allegedly acted beyond the

Revenue Service's inability to take action with respect to these matters prevented its assessment and collection of taxes.²⁴

scope of his authority and in an unconstitutional manner. But apart from the *Williams Packing* "under no circumstances" test, the concept of *ultra vires* action has no independent significance as an exception to the Anti-Injunction Act. Allegations of unconstitutionality do not establish an exception to the Anti-Injunction and Declaratory Judgment Acts. See pages 21-23 of our brief in No. 72-1371.

²⁴ The argument of *amicus* Council on Foundations (Br. 13-16) that the Anti-Injunction and Declaratory Judgment Acts prohibitions do not apply here because no assessments have yet been made, was properly rejected by both the Fourth Circuit and the District of Columbia Circuit (App. A135; R. 31). The University and Americans United have now abandoned the argument with good reason since the courts have long considered suits to enjoin preassessment administrative actions as in effect injunctions against assessment. See *Zamaroni v. Philpott*, 346 F. 2d 365 (C.A. 7) (suit to enjoin use of evidence in future action not yet in being); *Wahpeton Professional Services, P.C. v. Kniskern*, 275 F. Supp. 806 (D. N. Dak.) (suit to require issuance of professional corporation ruling); *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D.D.C.) (suit to require issuance of tax exemption ruling); *Koin v. Coyle*, 402 F. 2d 468 (C.A. 7) (suit to enjoin use of certain evidence in making an assessment); *Brewster v. United States*, 423 F. 2d 1061 (C.A. 5) (suit to restrain audit, review, or discussion of plaintiff's taxes); *Balistreri v. United States*, 303 F. 2d 617 (C.A. 7) (suit to enjoin issuance of administrative summons of records); *Campbell v. Guetersloh*, 287 F. 2d 878 (C.A. 5) (suit to restrain use of "bank desposit" method to compute tax deficiency); *William B. Scaife & Sons Co. v. Driscoll*, 94 F. 2d 664 (C.A. 3), certiorari denied, 305 U.S. 603 (suit to enjoin Commissioner's refusal to allow filing of amended return); *West Chester Feed & Supply Co. v. Erwin*, 438 F. 2d 929 (C.A. 6) (suit to require Commissioner

b. The ultimate effect of such injunctive actions upon the assessment and collection of taxes cannot be minimized by simply recharacterizing these suits, as Americans United contends (Br. 23), as attempts by such an organization to relieve itself of the "burden of not being able to raise funds"²⁵ To begin with, the withdrawal of such a ruling is obviously not a flat prohibition against the raising of funds. Moreover, even acknowledging that the suspension of an organization's deductibility assurance ruling might make its task of raising of funds more difficult, the alternative would be an immediate reduction of the revenues through allowance of preliminary injunc-

to reappraise property); *Ralston v. Heiner*, 21 F. 2d 494 (W.D. Pa.), affirmed, 24 F. 2d 416 (C.A. 3), certiorari denied, 277 U.S. 608 (suit to remove lien from property); *Calkins v. Smietanka*, 240 Fed. 138, 145-146 (N.D. Ill.) (suit to prevent production of records to Commissioner); *Gouge v. Hart*, 250 Fed. 802, 805 (W.D. Va.) (suit to nullify Government purchase of land at tax sale); *Tomlinson v. Poller*, 220 F. 2d 308 (C.A. 5), and *Czieslik v. Burnet*, 57 F. 2d 715 (E.D. N.Y.) (suit to prevent Commissioner's subjecting of property to tax lien); *Chester v. Ross*, 231 F. Supp. 23, 26 (N.D. Ga.), affirmed *per curiam* 351 F. 2d 949 (C.A. 5) (suit to restrain Commissioner's gathering of evidence to investigate plaintiff's taxes); *Miles v. Johnson*, 59 Fed. 38 (Cir. Ct. Ky.) (suit to restrain Commissioner from preventing withdrawal of whiskey which would exempt it from tax).

²⁵ Contrary to the view of the District of Columbia Circuit, we have argued at pages 23-24 of our brief in No. 72-1371, that such injunctive actions cannot be upheld on the basis of a simple assertion that the "primary design" of the complainant was not to restrain the assessment or collection of taxes.

tions in such cases. By enacting both the Anti-Injunction Act and adding the tax exception to the Declaratory Judgment Act, Congress has indicated that it did not intend the courts to interfere with the collection of revenues, whatever may be the impact of that principle upon the fund-raising ability of organizations claiming to be exempt from tax. Permitting such suits by alleged tax exempt organizations would have no less serious impact upon tax collection than permitting such suits by others.

It is accordingly not surprising that, except for the decision of the District of Columbia Circuit in No. 72-1371, every reported decision considering the question has held that the Anti-Injunction Act bars the courts from enjoining the Treasury from withdrawing tax-exemption or deductibility assurance rulings. *Crenshaw County Private School Foundation v. Connally*, 474 F. 2d 1185 (C.A. 5), petition for a writ of certiorari pending, No. 73-10; *Jolles Foundation, Inc. v. Moysey*, 250 F. 2d 166, 169 (C.A. 2); *Mitchell v. Riddell*, 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456; *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D. D.C.); *Kyron Foundation, Inc. v. Dunlap*, 110 F. Supp. 428 (D. D.C.); *Israelite House of David v. Holden*, 14 F. 2d 701 (W.D. Mich.).

c. Bob Jones University does not rely upon the tripartite exception to the Anti-Injunction Act created by the District of Columbia Circuit in No. 72-1371.

Recognizing that the withdrawal of its ruling would have resulted in assessments and collections of additional taxes, it simply contends (Br. 28) that the prohibitions of the Anti-Injunction Act are not applicable because "this is not a tax case" but the use of "the onerous taxing power of the government to force recalcitrant parties in line with social concepts not in any way authorized by any act of Congress."²⁶ But as the Fourth Circuit noted (App. A137-A138), this Court had rejected such an argument more than 50 years ago in *Bailey v. George*, 259 U.S. 16. There, the Court refused to enjoin the collection of a child labor tax despite the contention that the tax was not for the purpose of raising revenue but for regulating child labor. Indeed, the Court rejected the taxpayer's claim for equitable relief notwithstanding its holding on the same day that the tax at issue was unconstitutional. *Child Labor Tax Case*, 259 U.S. 20.

Moreover, given the impossibility of determining whether a tax is regulatory²⁷ or revenue-producing, the conclusion reached in *Bailey v. George*, *supra*, is manifestly sound. As the Court subsequently observed in *Sonzinsky v. United States*, 300 U.S. 506,

²⁶ Americans United (Br. 20) and *amicus* Council on Foundations (Br. 22-23) advance essentially the same contention. They urge that the Commissioner's policies with respect to tax-exempt organizations are more regulatory than revenue producing.

²⁷ It is noteworthy that Congress added the tax exception to the Declaratory Judgment Act in response to suits challenging the processing taxes, which could be classified as "regulatory". See *United States v. Butler*, 297 U.S. 1, 61.

513: "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect."

Thus, in numerous cases, the lower courts have upheld the statutory bars on injunctions against the Commissioner with respect to a variety of arguably regulatory taxes levied upon certain commodities or activities. See, e.g., *Singleton v. Mathis*, 284 F. 2d 616 (C.A. 8) (federal gambling tax); *Vasilinda v. United States*, C.A. 5, No. 71-1802, Slip Op. 3, fn. 2 (decided November 12, 1973) (marihuana taxes); *Lassoff v. Gray*, 266 F. 2d 745 (C.A. 6) (marihuana taxes); *Wells v. Campbell*, 113 F. Supp. 928 (N.D. Tex.) (marihuana taxes); *McAlister v. Cohen*, 436 F. 2d 422 (C.A. 4) (wagering taxes); *Gehman v. Smith*, 76 F. Supp. 805, 807-808 (E.D. Pa.) (tax on adulterated butter).

d. Finally, both Bob Jones (Br. 29-30) and Americans United (Br. 20-21) attempt to escape the application of the *Williams Packing* standard by relying upon earlier decisions of this Court such as *Hill v. Wallace*, 259 U.S. 44; *Lipke v. Lederer*, 259 U.S. 557; *Allen v. Regents*, 304 U.S. 439. Those cases involved applications of the "special and extraordinary facts and circumstances" test of *Miller v. Nut Margarine Co.*, 284 U.S. 498, 511. But the confusion over the interpretation of that standard was the precise reason given by this Court for hearing and deciding *Williams Packing* (see 370 U.S. at 2-3 and n. 1). The subsequently announced *Williams*

Packing rule was intended as a substitute and not as an additional test for determining the applicability of the Anti-Injunction Act.²⁸

3. *The proposed revocation of Bob Jones University's tax ruling because of its racially discriminatory admissions policy is not a case in which it is clear that under no circumstances could the government prevail on the merits of its claim.*

Section 501(c) (3) of the Code, Appendix, *infra*, pp. 43-44, provides a tax exemption for organizations

²⁸ In *Hill v. Wallace*, members of the Chicago Board of Trade had brought a type of shareholder derivative suit against the Board in order to test the constitutionality of a tax upon grain future transactions. Because the Commissioner of Internal Revenue was not served, he was dismissed as a defendant (259 U.S. at 72). Since the Court was likely to render an opinion as to the constitutionality of the statute, the Solicitor General appears to have waived the benefit of the Anti-Injunction Act and argued the substantive issue of the constitutionality of the statute (see 257 U.S. 310, 615). See also *Helvering v. Davis*, 301 U.S. 619. Similarly, *Lipke v. Lederer*, 259 U.S. 557, is not in point, as it involved penalties in the nature of punishment for a criminal offense, the violation of the National Prohibition Act. As the Court later stated in *Graham v. duPont*, 262 U.S. 234, 257, *Lipke* was "not [a case] of enjoining taxes at all."

Moreover, *Allen v. Regents*, 304 U.S. 439, does not, as *Americans United* suggests (Br. 21-23), support the proposition that the Anti-Injunction Act does not bar a suit by non-taxpayers regarding their statutory duties to collect and remit taxes owed by others. The lower courts have held to the contrary with respect to certain excise taxes and withholding taxes. *Jules Hairstylists of Maryland v. United States*, 268 F. Supp. 511 (D. Md.), affirmed *per curiam*, 389 F. 2d 389 (C.A. 4), certiorari denied, 391 U.S. 934; *Reamis v. Vroorman-Fehn Printing Co.*, 140 F. 2d 237 (C.A. 6). See also *Eighth Street Baptist Church v. United States*, 431 F. 2d 1193 (C.A. 10).

"organized and operated exclusively for religious, charitable * * * or educational purposes." Section 170(a) and (c) (2), Appendix, *infra*, permit a deduction for any "charitable contribution" made to such organizations. These statutes were respectively enacted in 1913 and 1917 in order to maintain public support of charities in the face of increased taxation. They are in *pari materia* and are designed to encourage organizations to perform beneficial functions which the government would otherwise have to conduct. See H. Rep. No. 1860, 75th Cong., 3d Sess., p. 19; 50 Cong. Rec. 1259; 55 Cong. Rec. 6728-6729, 6741; Weil, *Tax Exemptions for Racial Discrimination in Education*, 23 Tax L. Rev. 399, 401-402.

Since the Section 170(a) deduction is allowed for a "charitable contribution," it has been held that the recipient organization must qualify as "charitable," even if it performs "religious" or "educational" functions. *Green v. Connally, supra*, 330 F. Supp. at 1157-1160. See also Rev. Rul. 67-325, 1967-2 Cum. Bull. 113, 116 and authorities cited therein; Reiling, *Federal Taxation: What is a Charitable Organization?*, 44 A.B.A.J. 525, 527; Note, *Federal Tax Benefits to Segregated Private Schools*, 68 Col. L. Rev. 922, 941-942. This reading of the statutory provisions is supported by the Court's statement in *Helvering v. Bliss*, 293 U.S. 144, 147, that the deduction provision was enacted "in order to encourage gifts to religious, educational and other charitable objects * * *." (Emphasis supplied.)

At common law, a charitable trust could not be created for a purpose which is illegal or whose accomplishment would tend to frustrate some well-settled public policy. *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303, 311; Restatement of Trusts 2d, § 377, comment c. In light of this Court's historic decision in *Brown v. Board of Education*, 347 U.S. 483, and its progeny, it is beyond question that there is now a broad national policy against segregation in public education and public facilities as well as governmental assistance to private segregated facilities. Not only has this policy against segregated education been manifested in numerous decisions of this Court, but it has also found expression in Acts of Congress. Notably, Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, forbids discrimination on the grounds of race, color, or national origin in "any program or activity receiving Federal financial assistance." Thus, the national policy against segregated public education has been extended to forbid governmental aid to any program, public or private, which excludes or denies benefits to persons on the basis of race.²⁰

Most recently, in *Norwood v. Harrison*, No. 72-77, October Term, 1972 (decided June 25, 1973), the Court struck down a Mississippi free textbook loan

²⁰ See also, *Evans v. Abney*, 396 U.S. 435; *Commonwealth of Pennsylvania v. Brown*, 392 F. 2d 120 (C.A. 3), certiorari denied, 391 U.S. 921; *Wachovia Bank and Trust Co., N.A. v. Buchanan*, 346 F. Supp. 665 (D. D.C.); *Connecticut Bank & Tr. Co. v. Johnson Memorial Hospital*, 30 Conn. Supp. 1, 294 A.2d 586 (Conn. Super. Ct.).

program because it provided aid to both public schools and private racially segregated schools. In so holding, the Court observed (Slip Op. 10) that "[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."

Similarly, the recognition by the Internal Revenue Service of Bob Jones University's tax-exempt status and the right to receive tax-deductible contributions serves to "facilitate, reinforce, and support" its racially discriminatory admissions policy within the meaning of *Norwood*. Indeed, the importance of this tax treatment to the University's program is amply demonstrated by its effort to restrain the Commissioner in this case. Maintenance of this tax benefit cannot be allowed because it would, as this Court stated in an analogous context, "frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 33-34.

In light of these authorities, the conclusion of the three-judge court in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *sub nom. Coit v. Green*, 404 U.S. 997, that private schools practicing racial discrimination are not entitled to tax exemption or deductible contributions, appears to be inescapable. As a result, the potential withdrawal of the University's tax ruling under the announced policy of the Internal Revenue Service which is squarely in accord with the *Green* decision is manifestly sound. But under

the *Williams Packing* test, it is not necessary to demonstrate the correctness of this position on the merits. Rather, the University's claim for injunctive relief can only succeed if it can show that under no circumstances could the government ultimately prevail on the merits of its claim.

Given the extensive analysis of the question in the *Green* decision, it can hardly be said that "under no circumstances" could the government prevail in establishing that the University's conduct rendered it ineligible for the federal tax benefits in question. On this basis, the Fourth Circuit correctly rejected the University's claim for injunctive relief against the Commissioner.

B. Both Americans United and Bob Jones University have adequate legal means to litigate their eligibility for exempt status and tax deductible contributions.

In our brief in No. 72-1371 (pp. 34-37), we have pointed out that Americans United had at least two fully adequate legal means to challenge the Commissioner's revocation of its ruling. First, it could have filed a claim for refund of F.U.T.A. taxes which were due once its exemption was withdrawn.³⁰ Secondly, it could have arranged for a contributor to

³⁰ Contrary to the contention of Americans United (Br. 35), a charitable trust is also exempt from F.U.T.A. taxes and would therefore also be able to test its exempt status in a F.U.T.A. tax refund suit. Regardless of the application of Section 642(c), such trusts have long been held to be exempt under Section 501(c)(3). See, e.g., *Fifty-Third Union Trust Co. v. Commissioner*, 56 F. 2d 767 (C.A. 6); Rev. Proc. 73-29 1973-40 I.R.B. 18.

test his right to a charitable deduction in a Tax Court proceeding or refund suit.

These two remedies would have been available to Bob Jones University as well. In addition, it appears that the University had a third legal remedy at its disposal. Given its accountant's sworn statement (App. A43-A44) that the University itself would have owed substantial amounts of income if its ruling had been withdrawn, it could have litigated its right to exempt status either in the Tax Court or in a refund suit.³¹

³¹ This latter remedy was not available to Americans United because its lobbying activities did not terminate its exemption from income taxes. Rather, the Commissioner's action with respect to Americans United was to reclassify it as a Section 501(c)(4) organization which, while exempt from income taxes, is ineligible to receive tax deductible contributions. On the University's petition for rehearing, the Fourth Circuit (App. A150-A151) erroneously distinguished the Commissioner's action in the *Americans United* case on the ground that it did not affect the organization's tax liability at all. However, as a Section 501(c)(4) organization, Americans United did become liable for F.U.T.A. taxes. In any event, we submit that the effect of the injunction against assessment of donors is barred by the Anti-Injunction Act.

Americans United (Br. 34) and *amicus* Council on Foundations (Br. 11) argue that the refund suit is inadequate because the Internal Revenue Service might not issue the contested ruling even if the taxpayer prevailed on the merits in the refund suit. In support of this contention, they cite Paragraph 270 of the IRS Exempt Organization Handbook, which requires that an organization prevailing in a court test of its exempt status must file an exemption application and establish its right to exemption before the Internal Revenue Service will recognize its exempt status for years subsequent to those involved in the court's decision. As the agency charged with

Neither the University, Americans United, nor the *amici* question the existence and availability of these legal remedies. They urge, however, that the loss of contributions attendant upon the withdrawal of a tax ruling is an irreparable injury for which the legal remedies are inadequate.³² But even assuming that the loss of contributions would constitute an irreparable injury, this Court in *Williams Packing* held that that claim alone is insufficient to support a suit for injunctive relief against the assessment or collection of taxes. In appraising the scope of the Anti-Injunction Act, the Court emphasized that Congress did not make the availability of the injunctive remedy depend upon the lack of an efficient legal remedy as it did with respect to injunctions against state taxes. Cf. 28 U.S.C. 1341. Thus, the Court observed, "[i]ts failure to do so shows that such a suit [against federal tax collections] may not be entertained merely because collection would cause an

the administration of the tax statutes, it is necessary for the Internal Revenue Service to receive an application from such an organization in order to determine that the facts and law upon which the judgment of the court was based remains the same. We are advised by the Internal Revenue Service that while this requirement is absolutely necessary from an administrative standpoint, its normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit.

³² Moreover, it is the policy of the Internal Revenue Service to assist in preserving the recurring legal issues presented in such cases for presentation to the courts. *Mitchell v. Riddell*, 402 F. 2d 842 (C.A. 9), relied upon by Americans United (Br.

irreparable injury, such as the ruination of the taxpayer's enterprise (370 U.S. at 6).³³

Thus, in urging that the loss of contributions caused by the Commissioner's withdrawal of an exempt organization's ruling is an injury which warrants equitable relief, both the University and Amer-

28), is not to the contrary. There, the taxpayer did not even fill out a tax return and a tax was never assessed. Instead, he merely sent \$10 to the Internal Revenue Service with a statement that no tax was due for any year, and then demanded a refund on the ground that a trust was tax exempt. See Brief for the District Director, *Mitchell v. Riddell* (C.A. 9), No. 22406, pp. 3-6.

Finally, *Americans United* (Br. 32) points to the government's ability to moot out a refund suit as a limitation upon the adequacy of such a remedy, citing *Church of Scientology of Hawaii v. United States*, 485 F. 2d 313 (C.A. 9). But that case did not involve an attempt to avoid a legal test. The issue there was whether the organization's income in 1965 and 1966 inured to the benefit of private individuals in violation of the requirement of Section 501(c)(3). That issue was entirely factual and involved a development of the facts for each individual year. Neither the government's attempt to moot the suit, nor a judicial decision on the merits, would control the organization's right to a deductibility assurance or tax exemption ruling for any other years.

³³ Challenging the correctness of this statement of the Court in *Williams Packing*, *Americans United* (Br. 18, n. 9) attempts to import the exception in 28 U.S.C. 1341 for cases in which there is no "plain, speedy and efficient remedy" into the Anti-Injunction Act involved here. Its argument rests entirely upon statements in the legislative history of 28 U.S.C. 1341 that Congress had previously enacted "similar" measures. While the two statutes may be similar, the differences in their terms amply justify this Court's conclusion that their standards are not identical.

icans United seek a modification of the *Williams Packing* standard. This type of injury, however, is an inevitable consequence of the fact that disputes between taxpayers and the Internal Revenue Service are not instantly resolved through litigation.³⁴ While this process may be time consuming, the alternative sought by the University and Americans United—the right to a preliminary injunction—would render all contributions deductible throughout the litigation.

Given the broad policy underlying the Anti-Injunction Act,³⁵ it seems highly unlikely that Congress intended to allow organizations automatically to retain their exemptions and the right to receive deductible contributions during the pendency of the litigation in which their status is determined, in derogation of

³⁴ Americans United complains (Br. 33-34) that the legal remedy is inadequate because the unsuccessful party at trial can always appeal. But this is the case with respect to every type of tax litigation under the system of judicial review established by Congress.

³⁵ Nothing in 28 U.S.C. 1340, relied upon by Americans United (Br. 25), casts doubt upon the broad reach of the Anti-Injunction Act. The former provision gives the district courts subject matter jurisdiction over "any civil action arising under any Act of Congress providing for internal revenue." If this provision were construed as an independent grant of equity powers to the district courts in all federal tax cases, the force of the Anti-Injunction Act would effectively be eliminated. Surely, therefore, the two provisions must be harmoniously construed together so as to permit the district courts only to issue money judgments against the United States in tax cases.

the revenue,³⁶ regardless of the merits of their claims or the outcome of the litigation. We therefore submit that, other than those cases which meet the two-fold test of *Williams Packing*, no exception can be made from the strict prohibition on injunctions against the assessment or collection of taxes.

When viewed against the background of the entire advance rulings program administered by the Internal Revenue Service, there is little justification for allowing an exception from the *Williams Packing* rule for litigation involving eligibility for exempt status and receipt of deductible contributions. The deeply rooted Congressional policy against injunctions is equally applicable to all federal tax controversies.

Just as the University and Americans United may suffer by not being able to enjoy the benefits of tax deductible contributions while litigating their right to such treatment, many businesses and individuals delay entering into advantageous transactions in order to await the issuance of an Internal Revenue Service ruling with respect to its tax consequences. In many instances, the Internal Revenue Service will ultimately decline to issue the requested ruling or will issue an unfavorable decision. The parties may thereupon decide not to pursue the pro-

³⁶ Americans United (Br. 13) and *amicus* Council on Foundations (Br. 16) argue that there would be no revenue losses because prospective donors would simply redirect their contributions to other exempt organizations. Suffice it to say that there is no factual support for this speculative assertion.

posed transaction, often at great financial loss. In such cases, judicial resolution of the tax consequences can only be obtained after the transaction is executed.³⁷ If, however, taxpayers or affected nontaxpayers could, in advance of a transaction, force the Commissioner to rule favorably or, for that matter, to rule upon a question as to which he has declined to issue a decision, the courts would be inundated with requests for injunctions³⁸ covering the entire gamut of issues where tax rulings are usually

³⁷ For example, in *Commissioner v. Gordon*, 391 U.S. 83, this Court considered the tax consequences to the shareholders of a corporate transaction with respect to which the Internal Revenue Service had declined to issue a favorable ruling.

³⁸ Such judicial intrusions into the rulings program have already occurred. At the urging of an unincorporated association representing participants in a tax shelter cattle feed program which cited the District of Columbia Circuit's *Americans United* decision, a district court has recently issued an injunction forbidding the Internal Revenue Service to disallow deductions for end-of-year payments for feed as a distortion of income. *Cattle Feeders Tax Committee v. Shultz*, Civil No. 73-794-C (W.D. Okla.) (decided December 6, 1973). On November 6, 1973, the Internal Revenue Service had announced its intention to disallow these deductions if they materially distort income. See T.I.R. 1261, 1973 CCH Stand. Fed. Tax Rep., par. 6951.

In addition, another district court has ordered the Internal Revenue Service to revoke the exempt status of several hospitals on the alleged ground that they do not admit indigent patients. *Eastern Kentucky Welfare Rights Organization v. Shultz*, Civil No. 1378-71 (D.D.C.) (decided December 20, 1973).

sought.³⁹ Under such circumstances, the discretion necessary to administer the rulings program effectively would be seriously impaired.

In sum, the issuance of injunctions in cases involving eligibility for exempt status is no different in substance from controversies arising under any other provision of the Internal Revenue Code. The subjection of the wide variety of administrative actions of the Internal Revenue Service to judicial review and equitable remedies would severely disrupt the orderly collection of the nation's revenues. Both Congress and this Court have recognized the paramount importance of the revenue collection process and have therefore protected the Treasury from injunctive actions to which most other Executive departments and administrative agencies are subject. The rationale of the District of Columbia Circuit's modification to the strict protection afforded by the *Williams Packing* standard cannot be logically

³⁹ Common examples of requests for rulings by nontaxpayers include applications by governmental units as to whether interest on their bonds is exempt under Code Section 103; applications by corporations as to the tax effect of certain reorganization transactions on their shareholders; applications by employers as to the tax effect of pension plans upon their employees; applications by regulated investment companies (see Code Sections 851-855) regarding the tax effect of transactions on their shareholders; applications by cooperative housing corporations regarding the tax effects of their transactions on their tenant stockholders (see Code Section 216); applications by trade associations respecting the tax effect of transactions on their members; and applications by banks regarding the includability of accrued interest in the income of their depositors.

limited to questions involving tax-exempt status rulings. Modification of this strict protection in any respect would have a far reaching effect upon the collection of revenues and the administration of the entire tax ruling program. If changes of such a fundamental character are to be forthcoming with respect to the rule of *Williams Packing*, we submit that they should be made by Congress and not by the courts.

CONCLUSION

For the reasons stated, the judgment of the court of appeals in No. 72-1470 should be affirmed and the judgment of the court of appeals in No. 72-1371 should be reversed and the cause remanded to the district court with instructions to dismiss the complaint.

Respectfully submitted.

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JANUARY 1974.

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS
AND GIFTS.

* * * *

(c) [as amended by Sec. 201(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] *Charitable Contribution Defined*.—For purposes of this section, the term “charitable contribution” means a contribution or gift to or for the use of—

* * * *

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (includ-

ing the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * *

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

* * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political

campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * * *

SEC. 3301 [as amended by Sec. 301(a), Employment Security Amendments of 1970, P.L. 91-373, 84 Stat. 695]. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)).

SEC. 3306. DEFINITIONS.

* * * *

(c) [as amended by Sec. 105(a), Social Security Amendments of 1970, *supra*] *Employment*.—For purposes of this chapter, the term “employment” means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Inter-

nal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, * * * except—

* * * *

(8) [as amended by Sec. 533, Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lein Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such

person is the person against whom such tax was assessed.

* * * *

28 U.S.C.:

§ 2201 [as amended by Sec. 111, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

NO. 72-1470

Supreme Court, U. S.
FILED

JAN 4 1974

MICHAEL ROSAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

BOB JONES UNIVERSITY, *Petitioner,*

versus

GEORGE P. SHULTZ, Secretary of the Treasury of
The United States, and DONALD C. ALEXANDER,
Commissioner of Internal Revenue, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INDEX

	Page
Argument:	
I. Timely Injunctive relief is necessary to adequately protect exempt organizations.	1
A. There are compelling reasons for providing prior judicial review in revocation cases affecting exempt organizations	1
B. The Government's reasons supporting an all inclusive scope for the Anti-Injunction Statute have no weight in the case of exempt organizations	3
C. There is no public policy in derogation of the exercise of First Amendment freedom of religion rights.	4
II. The means suggested by the government to litigate the University's eligibility for exempt status are totally inadequate.....	7
Conclusion	8

CITATIONS

	Page
Cases:	
<i>Center on Corporate Responsibility, Inc. v. Shultz, et al</i> , No. 846-73 (D.C. D. C. December 11, 1973)	2
<i>Enochs v. Williams Packing Co.</i> , 370 U.S. 1	4
<i>Norwood v. Harrison</i> , U.S. , 93 S.Ct. 2804	5
<i>Walz v. Tax Commission</i> , 397 U.S. 664	6

Statutes:

Civil Rights Act of 1964, 78 Stat. 252, Sec. 601 5

Internal Revenue Code of 1954 (26 U.S.C.):

Section 170	7
Section 170 (a)	6
Section 170 (c)	6
Section 170 (c) (2)	6
Section 170 (c) (2) (B)	7
Section 501 (c) (3)	1

Miscellaneous:

Publication 78, Cumulative List of Organizations 3

The Wall Street Journal, Eastern Edition,
October 24, 1972 and October 31, 1972 7

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REPLY BRIEF FOR THE PETITIONER

I

TIMELY INJUNCTIVE RELIEF IS NECESSARY TO
ADEQUATELY PROTECT EXEMPT ORGANIZATIONS.

A. *There Are Compelling Reasons For Providing Prior
Judicial Review In Revocation Cases Affecting Exempt Or-
ganizations.*

Exempt organizations occupy a unique place in our society and under the Internal Revenue Code. First, they engage in a number of widely varying activities under the rather loosely worded provisions of 501(c)(3). Second, they are extremely vulnerable to destruction through loss of their advance assurance of deductibility of contributions.

Those corporate entities normally subject to taxation have one basic goal dictated by the profit motive. Certainly normal business corporations engage in a wide variety of activities but their ultimate goal, sometimes tempered by corporate and social responsibility, is to generate an adequate return for the equity owners of the business. In contrast, exempt organizations, responsible to no shareholder for profits, engage in numerous activities and promote widely divergent goals which have contributed greatly to the pluralism in American society.

To survive, an exempt organization must attract private support for its activities. Government has never compelled gifts to any exempt organization. Therefore, should any organization fail to attract sufficient support, it will perish no matter what government action may be taken for or against it. However, due to their dependence upon voluntary tax deductible contributions, exempt organizations are at the mercy of officials in the Internal Revenue Service.

Recently, it has been all too apparent that reliance solely upon the good graces of the Executive Department, indeed the Internal Revenue Service, for the protection of fundamental rights may be grossly misplaced. In *Center on Corporate Responsibility, Inc. v. Shultz, et al*, No. 846-73 (D.C. D.C. December 11, 1973), an exempt organization was given reason to believe that political pressure emanating from the White House was responsible for the refusal of the Internal Revenue Service to extend exempt status. Although primarily a refund suit, the organization sought and was granted injunctive relief.

Here the University has no information to support a contention that political pressure has resulted in the treatment it has individually received from the Internal Revenue Service. Nevertheless, the demonstrated capacity of political appointees to deal fatal blows to exempt organizations only reinforces the University's contention that meaningful and timely judicial review is necessary prior to the infliction of irreparable and often fatal harm through the withdrawal of advance assurance of deductibility of contributions.

The power the government possesses and has demonstrated its willingness to use has enormous potential. They

assert the power to eliminate in large measure the diversity that exempt organizations contribute to our society.¹

B. The Government's Reasons Supporting An All Inclusive Scope For The Anti-Injunction Statute Have No Weight In The Case Of Exempt Organizations.

It is surprising, if not amusing, to find the government despairing "the very existence of government"² if injunctive relief is granted in cases such as this. The United States has never collected or relied upon taxes extracted from exempt organizations. The United States government has prospered and grown during the University's entire forty-odd years of existence. There are no far-reaching adverse consequences which could result from granting judicial review to exempt organizations prior to withdrawal of their advance assurance of deductibility of contributions.

The government points to alternative remedies exempt organizations may seek including procedures in the United States Tax Court. If Tax Court procedures are followed, revenues are never extracted from the exempt organization if it is successful. Thus, the dismal scene envisioned by the government of revenues being withheld, is not a new result which would be occasioned by prior judicial scrutiny of exempt organization status.

Neither the government nor the exempt organization can positively point to a casual relationship between the withdrawal of advance assurance of deductibility affecting any designated exempt organization and the overall revenues of the Federal Government. The University asserts that upon withdrawal of advance assurance from any individual entity that potential donors to that entity will divert their contributions to other organizations enjoying exempt status. Presumably, the government's contention is that donors are locked

¹Such divergent organizations as the NAACP Legal Defense and Educational Fund, Inc., the Malcolm X Organization of Afroamerican Unity, Inc. and the Reorganized Church of Jesus Christ of Latter Day Saints are listed as exempt in Publication 78, Cumulative List of Organizations.

²Respondents' Brief, pp. 15, 16.

to particular organizations and that when advance assurance is removed, government revenues are increased because these donors cease making deductible contributions. However, the government can point to no concrete evidence which would support this result. Logic dictates that individuals will continue to make charitable contributions even if one of the potential beneficiaries of their charity loses its tax exempt status. In any event, the government cannot point to any definite loss of revenue it might sustain if exempt organizations are entitled to prior judicial review. Surely any such hypothetical loss cannot supply a compelling reason for inclusion of exempt organizations in the overall scope of the Anti-Injunction Statute. The mere possibility of the loss of insignificant revenues was not the basis for this Court's reasoning in *Enochs v. Williams Packing Co.*, 370 U.S. 1. Therefore, the Court's concern that the government be assured of the "prompt collection of its lawful revenues" does not provide a proper basis for withdrawal of timely judicial scrutiny in the case of exempt organizations. This is especially so where, as here, the government has managed to struggle along throughout the existence of the University without any of the tax revenues which now are said to loom so importantly on the government's fiscal horizon.

C. There Is No Public Policy In Derogation Of The Exercise Of First Amendment Freedom Of Religion Rights.

The government speaks of a broad national policy against segregation in *public* education which has been extended to forbid governmental aid to any program, public or private, which excludes or denies benefits to persons on the basis of race.³ However the government does not and cannot point to any public policy infringing upon the exercise of basic First Amendment rights. The government does not dispute the fact that the University's admissions policy is an expression of its well-established religious beliefs. This Court has con-

³Respondents' Brief, p. 31.

sistently held that the very rights asserted by the University here are essential to our constitutional form of government. Furthermore, the University's religious beliefs as expressed in its admissions policy do not frustrate any otherwise valid national policy in favor of non-segregated education.

Hundreds of institutions of higher learning in the United States operate under the direct control of and receive direct financial support from state governments. These institutions cannot under applicable constitutional restrictions discriminate on the basis of race or religion in their admissions policies. Furthermore, the overwhelming majority of private schools receive state or federal grants and are bound by the terms of Title VI of the Civil Rights Act of 1964. Bob Jones University is unique in that it receives no money from any government and has steadfastly maintained its fundamentalistic religious beliefs and practices.

Students seeking and desiring an education at an integrated institution of higher learning have no difficulties in this country in finding such an institution in all states. Where there is no question as to state action being involved in the operation of an institution of higher learning such as is the case here, there is no reason to penalize attendance at the University.

The government relies upon *Norwood v. Harrison*, U.S. , 93 S.Ct. 2804, for the proposition that the granting of tax exempt status to the University serves as government support for its admissions policy. *Norwood* involved a Mississippi textbook loan plan which provided books for use in segregation academies in Mississippi. No freedom of religion assertions were made or ruled upon in *Norwood*. There the Court stated:

Racial discrimination in state operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

While this be true in the situation encountered in *Norwood*, it has no applicability here where significant First Amendment religious rights are involved. Tax exemption does not constitute constitutionally significant state inducement, encouragement or promotion, for if it did, serious establishment questions would be raised. Government cannot conduct religious services, nor can government operate a religious school. But government can and does grant churches and religious schools tax exempt status. By doing so, government exercises only "benevolent neutrality" and does not "induce, encourage or promote" any activity, religion or religiously motivated admissions policy. *Waltz v. Tax Commission*, 397 U.S. 664.

Similarly, the government argues that the University cannot be charitable under the applicable Internal Revenue Code sections because these sections are "designed to encourage organizations to perform beneficial functions which the government would otherwise have to conduct."⁴ However, Constitutional prohibitions prevent government from conducting numerous functions which are conducted by recognized charitable organizations enjoying exempt status. Religious organizations have always been considered charitable.

The government refers to "charitable contributions" which are deductible under Section 170(a) and (c) (2) of the Internal Revenue Code for support for its argument that an exempt organization must be "charitable" as well as "religious" or "educational." However, Section 170(c) provides "for the purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of—" an organization organized and operated exclusively for religious, charitable or educational purposes. The use of the term "charitable contribution" in 170(c) adds nothing to the government's argument that an organization must be charitable as well as religious or educational. Otherwise, there would be no reason for

⁴Respondents' Brief, p. 30.

the inclusion of the word "charitable" in Section 170(c) (2) (B).⁵

II

THE MEANS SUGGESTED BY THE GOVERNMENT TO LITIGATE THE UNIVERSITY'S ELIGIBILITY FOR EXEMPT STATUS ARE TOTALLY INADEQUATE

The government suggests that the University may seek a judicial determination of its exempt status by a refund suit for FUTA taxes, or by litigation brought by one of the University's contributors. In addition to these judicial avenues, the University could litigate its obligation to pay income taxes. All of these suggested avenues embody the same serious and overriding defect. No matter which route is selected the University will suffer needless irreparable harm from a loss of contributions during the time any such litigation is pending. The effects of such irreparable harm would survive even a favorable judicial determination.⁶

The government acknowledges its ability to inflict serious harm upon an exempt organization but relies upon the

⁵Section 170 of the Internal Revenue Code, 26 U.S.C. § 170 provides in pertinent part as follows:

"(a) Allowance of deduction.—

(1) General Rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year.

• • •

(c) Charitable Contribution, defined.—

For purposes of this Section, the term 'charitable contribution' means a contribution or gift to or for the use of—

(2) A corporation, trust or community chest, fund, or foundation—

• • •

(B) Organized and operated exclusively for religious, charitable . . . or educational purposes. . . ."

⁶Upon its determination to withdraw advance assurance of deductibility of contributions, the Internal Revenue Service would cause such determination to be published. Once published, subsequent restoration of exempt status would hardly provide the complete and immediate cure to the damage already done. On October 24, 1972, The Wall Street Journal incorrectly stated that the University had lost its tax exempt status in a lead story commencing on Page 1. A subsequent retraction published October 31, 1972, is almost invisible on Page 36 nestled among over-the-counter quotations.

Williams Packing case to justify such action. However, in *Williams Packing* the injury to be suffered by the taxpayer was balanced against the potential injury to be suffered by the government through its disruption of the orderly collection of its lawful revenues. Here that aspect of *Williams Packing* over balancing in favor of the government's position, i.e., the orderly collection of revenues, is not present. Here the government can point to no compelling reason which would justify the irreparable harm which exempt organizations will suffer.

As viewed by the government, the entire advance ruling program administered by the Internal Revenue Service would be placed in jeopardy should injunctive relief be made available to exempt organizations. Exactly how the advance ruling system is thus jeopardized is unclear. Presumably, the Service would continue its ruling program on exempt organizations as well as other matters in the same manner as is presently done. Simply granting meaningful judicial scrutiny over administrative actions does not eliminate the need or the usefulness of proper agency action. Presumably in the overwhelming majority of cases, the Service's determination would be accepted. If anything, the quality of administrative action would be improved as a result of the availability of effective judicial review.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully Submitted,

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Syllabus

BOB JONES UNIVERSITY v. SIMON, SECRETARY
OF THE TREASURY, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 72-1470. Argued January 7, 1974—Decided May 15, 1974

Petitioner, a private university, was notified by the Internal Revenue Service (IRS), pursuant to a newly announced policy of denying tax-exempt status for private schools with racially discriminatory admissions policies, that it was going to revoke a ruling letter declaring that petitioner qualified for tax-exempt status under § 501 (c) (3) of the Internal Revenue Code of 1954 (Code). Petitioner sued for injunctive relief to prevent revocation, alleging irreparable injury in the form of income tax liability and loss of contributions and claiming that the revocation would violate petitioner's rights to free exercise of religion, to free association, and to due process and equal protection of the laws. The District Court granted relief despite § 7421 (a) of the Code, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The Court of Appeals reversed, holding that § 7421 (a), as construed in *Enochs v. Williams Packing & Navigation Co.*, 370 U. S. 1, foreclosed relief. Under that decision a pre-enforcement injunction against tax assessment or collection may be granted only if (1) "it is clear that under no circumstances could the Government ultimately prevail" and (2) "if equity jurisdiction otherwise exists." *Held*:

1. The suit is one "for the purpose of restraining the assessment or collection of any tax" within the meaning of § 7421 (a). Pp. 738-742.

(a) Petitioner's allegation that revocation of the ruling letter would subject it to "substantial" income tax liability demonstrates that a primary purpose of the suit is to prevent the IRS from assessing and collecting income taxes; but even if no income tax liability resulted, the suit would still be one to restrain the assessment and collection of federal social security and unemployment taxes, as well as to restrain the collection of taxes from petitioner's donors. Pp. 738-739.

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Opinion of the Court

416 U.S.

(b) Petitioner has not shown that the contemplated revocation of its ruling letter is not based on the IRS' good-faith effort to enforce the technical requirements of the Code. Pp. 739-741.

2. Petitioner's contention that § 7421 (a) is subject to judicially created exceptions other than the *Williams Packing* test is without merit. That decision constitutes an all-encompassing reading of § 7421 (a), and it rejected the contention, relied upon by petitioner, that irreparable injury alone is sufficient to lift the statutory bar. Pp. 742-746.

3. Denying injunctive relief to petitioner under the standards of *Williams Packing*, *supra*, will not, because of alleged irreparable injury pending resort to alternative remedies, deny petitioner due process of law, since this is not a case where an aggrieved party has no access at all to judicial review. The review procedures that are available are constitutionally adequate, even though involving serious delay. Pp. 746-748.

4. Petitioner has not met the standards of *Williams Packing*, *supra*, since its contentions are sufficiently debatable to foreclose any notion that "under no circumstances could the Government ultimately prevail." Pp. 748-750.

472 F. 2d 903 and 476 F. 2d 259, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 750. DOUGLAS, J., took no part in the decision of the case.

J. D. Todd, Jr., argued the cause for petitioner. With him on the briefs were *Wesley M. Walker* and *Oscar Jackson Taylor, Jr.*

Assistant Attorney General Crampton argued the cause for respondents. With him on the brief were *Solicitor General Bork*, *Stuart A. Smith*, *Grant W. Wiprud*, and *Leonard J. Henzke, Jr.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case and *Alexander v. "Americans United" Inc.*, *post*, p. 752, involve the application of the Anti-Injunc-

tion Act, § 7421 (a) of the Internal Revenue Code of 1954 (the Code), 26 U. S. C. § 7421 (a), to the ruling letter program of the Internal Revenue Service (the Service) for organizations claiming tax-exempt status under Code § 501 (c)(3), 26 U. S. C. § 501 (c)(3). The question presented is whether, prior to the assessment and collection of any tax, a court may enjoin the Service from revoking a ruling letter declaring that petitioner qualifies for tax-exempt status and from withdrawing advance assurance to donors that contributions to petitioner will constitute charitable deductions under Code § 170 (c)(2), 26 U. S. C. § 170 (c)(2). We hold that it may not.

I

Section 501 (a) of the Code exempts from federal income taxes organizations described in § 501 (c)(3). The latter provision encompasses:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Section 501 (c)(3) organizations are also exempt from federal social security (FICA) taxes by virtue of Code § 3121 (b)(8)(B), 26 U. S. C. § 3121 (b)(8)(B), and from federal unemployment (FUTA) taxes by virtue of § 3306 (c)(8), 26 U. S. C. § 3306 (c)(8). Dona-

tions to § 501 (c)(3) organizations are tax deductible under § 170 (c)(2).¹

As a practical matter, an organization hoping to solicit tax-deductible contributions may not rely solely on technical compliance with the language of §§ 501 (c)(3) and 170 (c)(2). The organization must also obtain a ruling letter from the Service, pursuant to Rev. Procs. 72-3 and 72-4, 1972-1 Cum. Bull. 698, 706, declaring that it qualifies under § 501 (c)(3). Receipt of such a ruling letter leads, in the ordinary case, to inclusion in

¹Section 170 (a) of the Code provides that "[t]here shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . . ." Section 170 (c)(2) declares:

"Charitable contribution defined.—For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of—

"(2) A corporation, trust, or community chest, fund, or foundation—

"(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

The organizations set forth in § 170 (c)(2) are, but for a few unimportant exceptions, the same as those described in § 501 (c)(3). Analogous deductions for contributions to § 501 (c)(3) organizations are provided for federal estate and gift tax purposes. See Code §§ 2055 (a)(2) and 2522 (a)(2), 26 U. S. C. §§ 2055 (a)(2) and 2522 (a)(2).

the Service's periodically updated Publication No. 78, "Cumulative List of Organizations described in Section 170 (c) of the Internal Revenue Code of 1954" (the Cumulative List). In essence, the Cumulative List is the Service's official roster of tax-exempt organizations: "The listing of an organization in [the Cumulative List] signifies it has received a ruling or determination letter . . . stating that contributions by donors to the organization are deductible as provided in section 170 of the Code." Rev. Proc. 72-39, 1972-2 Cum. Bull. 818. An organization's inclusion in the Cumulative List assures potential donors in advance that contributions to the organization will qualify as charitable deductions under § 170 (c)(2). The Service has announced that, with narrowly limited exceptions, a donor may rely on the Cumulative List for so long as the beneficiaries of his largesse maintain their listing, regardless of their actual tax status.² For this reason, appearance on the Cumulative List is a prerequisite to successful fund raising

² Section 3.01 of Rev. Proc. 72-39, 1972-2 Cum. Bull. 818, provides:

"Where an organization listed in [the Cumulative List] ceases to qualify as an organization contributions to which are deductible under section 170 of the Code and the Service subsequently revokes a ruling or a determination letter previously issued to it, contributions made to the organization by persons unaware of the changes in the status of the organization generally will be considered allowable if made on or before the date of publication of the Internal Revenue Bulletin announcing that contributions are no longer deductible. However, the Service is not precluded from disallowing a deduction for any contribution made after an organization ceases to qualify under section 170, where the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for, or was aware of, the activities or deficiencies on the part of the organization that gave rise to the loss of qualification."

for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List.³

Because of the importance of inclusion in the Cumulative List, revocation of a § 501 (c)(3) ruling letter and consequent removal from the Cumulative List is likely to result in serious damage to a charitable organization.⁴ Revocation not only threatens the flow of contributions, it also subjects the affected organization to FICA and FUTA taxes and, assuming that the organization has taxable income and does not qualify as tax exempt under another subsection of § 501, to federal income taxes.⁵ Upon the assessment and attempted collection of income taxes, the organization may litigate the legality of the Service's action by petitioning the Tax Court to review a notice of deficiency. See Code §§ 6212 and 6213, 26 U. S. C. §§ 6212 and 6213. Or, following the collection of any federal tax and the denial of a refund by the Service, the organization may bring a

³ This is particularly so with respect to tax-exempt private foundations, because they are subject to tax liability if they contribute funds to an organization that does not qualify under § 170 (c)(2). See Code § 4945 (d)(5), 26 U. S. C. § 4945 (d)(5).

⁴ In recognition of the significance of such a change in status, the Service provides several stages of internal administrative review. If the Service indicates, pursuant to prescribed procedures, that cause for revocation exists, the affected organization is entitled to submit written protests and to conferences at both the District Director and National Office level. Section 11, Rev. Proc. 72-4, 1972-1 Cum. Bull., at 708; Section 4, Rev. Proc. 72-39, 1972-2 Cum. Bull., at 818-819.

⁵ An organization may lose its § 501 (c)(3) status but still be exempt from federal income taxes if it qualifies, for example, as a § 501 (c)(4) social welfare organization. But the loss of § 501 (c)(3) status inevitably means that the exemptions from FICA and FUTA taxes no longer apply, since those exemptions are keyed to § 501 (c)(3). See Code §§ 3121 (b)(8)(B) and 3306 (c)(8).

refund suit in a federal district court or in the Court of Claims. See Code § 7422, 26 U. S. C. § 7422; 28 U. S. C. §§ 1346 (a)(1) and 1491. Finally, a donor to the organization may bring a refund suit to challenge the denial of a charitable deduction under § 170 (c)(2). Presumably such a "friendly donor" would be able to attack the legality of the Service's revocation of an organization's § 501 (c)(3) status. But these post-revocation avenues of review take substantial time, during which the organization is certain to lose contributions from those donors whose gifts are contingent on entitlement to charitable deductions under § 170 (c)(2). Accordingly, any organization threatened with revocation of a § 501 (c)(3) ruling letter has a powerful incentive to bring a pre-enforcement suit to prevent the Service from taking action in the first instance.

The pressures operating on organizations facing revocation of § 501 (c)(3) status to seek injunctive relief against the Service pending judicial review of the proposed action conflict directly with a congressional prohibition of such pre-enforcement tax suits. In force continuously since its enactment in 1867, the Anti-Injunction Act, now Code § 7421 (a), provides in pertinent part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" ⁶ Because an injunction

⁶ See Act of Mar. 2, 1867, § 10, 14 Stat. 475; Rev. Stat. § 3224 (1874); Int. Rev. Code of 1939, § 3653. Section 7421 (a) of the Code states:

"Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), *no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.*" (Emphasis added.)

The italicized portion of § 7421 (a) is identical to language in § 10 of the Act of Mar. 2, 1867, but for the first "any," which the revisers

preventing the Service from withdrawing a § 501 (c) (3) ruling letter would necessarily preclude the collection of FICA, FUTA, and possibly income taxes from the affected organization, as well as the denial of § 170 (c) (2) charitable deductions to donors to the organization, a suit seeking such relief falls squarely within the literal scope of the Act.⁷

added to the Revised Statutes version. See *Snyder v. Marks*, 109 U. S. 189, 192 (1883). None of the exceptions in § 7421 (a) is relevant to this case. The phrase commencing with "by any person . . ." was added by § 110 (c) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 Stat. 1144. The main purpose of the addition of this language was to deal with cases where third parties who are not themselves subject to tax liability hold property liens that compete with federal tax liens. Due to the literal meaning of the Anti-Injunction Act, such persons were, prior to 1966, often unable to protect their legitimate property interests when the Service foreclosed on property on which it held a tax lien. See H. R. Rep. No. 1884, 89th Cong., 2d Sess., 27-28 (1966). Such persons are now given a right of action under Code § 7426, 26 U. S. C. § 7426, and the language of § 7421 (a), as amended, renders that action exclusive. The "by any person" phrase is, however, also a reaffirmation of the plain meaning of the emphasized portion of § 7421 (a). In this respect, it is declaratory, not innovative. Cf. Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L. J. 51, 57, n. 22 (1972). We are aware of the contrary reading of the "by any person" phrase in *McGlotten v. Connelly*, 338 F. Supp. 448, 453 n. 25 (DC 1972) (three-judge court), but we are of a different view.

⁷ The congressional antipathy for premature interference with the assessment or collection of any federal tax also extends to declaratory judgments. In 1935, one year after the enactment of the Declaratory Judgment Act, 48 Stat. 955, now 28 U. S. C. §§ 2201-2202, Congress amended that Act to exclude suits "with respect to Federal taxes . . .," § 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1027, thus reaffirming the restrictions set out in the Anti-Injunction Act. The Declaratory Judgment Act now reads:

"§ 2201. Creation of Remedy.

"In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States, upon

The clash between the language of the Anti-Injunction Act and the desire of § 501 (c)(3) organizations to block the Service from withdrawing a ruling letter has been resolved against the organizations in most cases. *E. g.*,

the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis added.)

"§ 2202. Further relief.

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Some have noted that the federal tax exception to the Declaratory Judgment Act may be more sweeping than the Anti-Injunction Act. *E. g.*, E. Borchard, *Declaratory Judgments* 855 (2d ed. 1941); Bittker & Kaufman, *supra*, n. 6, at 58. See S. Rep. No. 1240, 74th Cong., 1st Sess., 11 (1935). The Service takes that position in this case, arguing that any suit for an injunction is also an action for a declaratory judgment and thus is barred by the literal terms of the Declaratory Judgment Act, without regard to the independent force of § 7421 (a). A number of courts, on the other hand, have held that the federal tax exception to the Declaratory Judgment Act and the Anti-Injunction Act have coterminous application. *E. g.*, "*Americans United*" Inc. v. *Walters*, 155 U. S. App. D. C. 284, 291, 477 F. 2d 1169, 1176 (1973), *rev'd sub nom. Alexander v. "Americans United" Inc.*, *post*, p. 752; *Tomlinson v. Smith*, 128 F. 2d 808 (CA7 1942); *McGlotten v. Connally*, *supra*; *Jules Hairstylists of Maryland, Inc. v. United States*, 268 F. Supp. 511 (Md. 1967), *aff'd*, 389 F. 2d 389 (CA4), *cert. denied*, 391 U. S. 934 (1968). Petitioner cites these cases in response to the Service's reliance on the Declaratory Judgment Act. There is no dispute, however, that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act. Because we hold that the instant case is barred by the latter provision, there is no occasion to resolve whether the former is even more preclusive. Nor need we decide whether any action for an injunction is of necessity a request for a declaration of rights that triggers the terms of the Declaratory Judgment Act.

Crenshaw County Private School Foundation v. Connally, 474 F. 2d 1185 (CA5 1973), pet. for cert. pending in No. 73-170; *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (DC 1963); *Israelite House of David v. Holden*, 14 F. 2d 701 (WD Mich. 1926).^{*} But see, *McGlotten v. Connally*, 338 F. Supp. 448 (DC 1972) (three-judge court). Cf. *Green v. Connally*, 330 F. Supp. 1150 (DC); aff'd *per curiam sub nom. Coit v. Green*, 404 U. S. 997 (1971).

In the present case, the Court of Appeals for the Fourth Circuit followed the majority view. *Bob Jones University v. Connally*, 472 F. 2d 903, petition for rehearing denied, 476 F. 2d 259 (1973). In light of the contrary result reached by the Court of Appeals for the District of Columbia Circuit in "*Americans United*" Inc. v. *Walters*, 155 U. S. App. D. C. 284, 477 F. 2d 1169 (1973), rev'd *sub nom. Alexander v. "Americans United" Inc.*, post, p. 752, we granted Bob Jones University's petition for certiorari. 414 U. S. 817 (1973).

II

Petitioner refers to itself as "the world's most unusual university." Founded in 1927 and now located in Greenville, South Carolina, the University is devoted to the teaching and propagation of its fundamentalist religious beliefs. All classes commence and close with prayer,

^{*} Several courts have reached the same result under the federal tax exception to the Declaratory Judgment Act, set forth in n. 7, *supra*. E. g., *Liberty Amendment Committee of the U. S. A. v. United States*, Civil Action No. 70-721 (CD Cal. June 19, 1970) (unpublished), aff'd *per curiam*, No. 26507 (CA9 July 7, 1972) (unpublished), cert. denied, 409 U. S. 1076 (1972); *Mitchell v. Riddell*, 402 F. 2d 842 (CA9 1968), appeal dismissed and cert. denied, 394 U. S. 456 (1969); *Jolles Foundation, Inc. v. Moysey*, 250 F. 2d 166 (CA2 1957); *Kyron Foundation v. Dunlap*, 110 F. Supp. 428 (DC 1952).

and courses in religion are compulsory. Students and faculty are screened for adherence to certain religious precepts and may be expelled or dismissed for lack of allegiance to them. One of these beliefs is that God intended segregation of the races and that the Scriptures forbid interracial marriage. Accordingly, petitioner refuses to admit Negroes as students. On pain of expulsion students are prohibited from interracial dating, and petitioner believes that it would be impossible to enforce this prohibition absent the exclusion of Negroes.

In 1942, the Service issued petitioner a ruling letter under § 101 (6) of the Internal Revenue Code of 1939, the predecessor of § 501 (c)(3). In 1970, however, the Service announced that it would no longer allow § 501 (c)(3) status for private schools maintaining racially discriminatory admissions policies and that it would no longer treat contributions to such schools as tax deductible. See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230. The Service requested proof of a nondiscriminatory admissions policy from all such schools and warned that tax-exempt ruling letters would be reviewed in light of the information provided. At the end of 1970, petitioner advised the Service that it did not admit Negroes, and in September 1971, further stated that it had no intention of altering this policy. The Commissioner of Internal Revenue therefore instructed the District Director to commence administrative procedures leading to the revocation of petitioner's § 501 (c)(3) ruling letter.

Petitioner brought these administrative proceedings to a halt by filing suit in the United States District Court for the District of South Carolina for preliminary and permanent injunctive relief preventing the Service from revoking or threatening to revoke petitioner's tax-exempt status. Petitioner alleged irreparable injury in the form of substantial federal income tax liability and the loss of

contributions. Petitioner asserted that the Service's threatened action was outside its lawful authority and would violate petitioner's rights to the free exercise of religion, to free association, and to due process and equal protection of the laws.

The District Court rejected a motion to dismiss for lack of jurisdiction, and it preliminarily enjoined the Service from revoking or threatening to revoke petitioner's tax-exempt status and from withdrawing advance assurance of the deductibility of contributions made to petitioner. *Bob Jones University v. Connally*, 341 F. Supp. 277 (SC 1971). The Court of Appeals for the Fourth Circuit reversed, with one judge dissenting. 472 F. 2d 903, reh. den., 476 F. 2d 259 (1973). That court held that petitioner's suit was barred by the Anti-Injunction Act as interpreted by this Court in *Enochs v. Williams Packing & Navigation Co.*, 370 U. S. 1. (1962).

III

The Anti-Injunction Act apparently has no recorded legislative history,⁹ but its language could scarcely be more explicit—"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, "and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Navi-*

⁹ See Note, Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition, 49 Harv. L. Rev. 109 n. 9 (1935); Gorovitz, Federal Tax Injunctions and the Standard Nut Cases, 10 Taxes 446 n. 6 (1932).

gation Co., *supra*, at 7. See also, *e. g.*, *State Railroad Tax Cases*, 92 U. S. 575, 613-614 (1876). Cf. *Cheatham v. United States*, 92 U. S. 85, 88-89 (1876). The Court has also identified "a collateral objective of the Act—protection of the collector from litigation pending a suit for refund." *Williams Packing, supra*, at 7-8.

In furtherance of these goals, the Court in its most recent reading gave the Act almost literal effect. In *Williams Packing*, an employer sought to enjoin the collection of FICA and FUTA taxes that the employer alleged were not owed and would destroy its business. The Court held unanimously that the suit was barred by the Act. Only upon proof of the presence of two factors could the literal terms of § 7421 (a) be avoided: first, irreparable injury, the essential prerequisite for injunctive relief in any case; and second, certainty of success on the merits. *Id.*, at 6-7. An injunction could issue only "if it is clear that under no circumstances could the Government ultimately prevail" *Id.*, at 7. And this determination would be made on the basis of the information available to the Government at the time of the suit. "Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Ibid.*

Perhaps in recognition of the stringent nature of the *Williams Packing* standard and its implications for this case, petitioner makes little effort to argue that it can meet that test. Rather, it asserts that the Anti-Injunction Act, properly construed, is not applicable, that *Williams Packing* is not the controlling reading of the Act, and that rejection of both these contentions would work a denial of due process of law. We find these arguments unpersuasive.

A

First, petitioner contends that the Act is inapplicable because this is not a suit "for the purpose of restraining the assessment or collection of any tax" Under petitioner's theory, its suit is intended solely to compel the Service to refrain from withdrawing petitioner's § 501 (c) (3) ruling letter and from depriving petitioner's donors of advance assurance of deductibility. Petitioner describes its goal as the maintenance of the flow of contributions, not the obstruction of revenue.

Petitioner's complaint and supporting documents filed in the District Court belie any notion that this is not a suit to enjoin the assessment or collection of federal taxes from petitioner. In support of its claim of irreparable injury, petitioner alleged in part that it would be subject to "substantial" federal income tax liability if the Service were allowed to carry out its threatened action. App. 6. Petitioner buttressed this contention with sworn affidavits alleging federal income tax liability of three-quarters of a million dollars for one year and in excess of half a million dollars for another and stressing the detrimental effect such tax liability would have on petitioner's capacity to operate its institution, to support its personnel, and to continue with its expansion plans. *Id.*, at 10-11, 43-44. These allegations leave little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting income taxes from petitioner.

We recognize that petitioner's assertions that it will owe federal income taxes should its § 501 (c) (3) status be revoked are open to debate, because they are based in part on a failure to take into account possible deductions for depreciation of plant and equipment. Even if it could be shown, however, that petitioner would owe no federal income taxes if its § 501 (c) (3) status were

revoked, this would still be a suit to restrain the assessment or collection of taxes because petitioner would also be liable for FICA and FUTA taxes. Section 7421 (a) speaks of "any tax"; it does not differentiate between federal income taxes or FICA or FUTA taxes. See, e. g., *Williams Packing, supra*. Moreover, petitioner seeks to restrain the collection of taxes from its donors—to force the Service to continue to provide advance assurance to those donors that contributions to petitioner will be recognized as tax deductible, thereby reducing their tax liability. Although in this regard petitioner seeks to lower the taxes of those other than itself, the Act is nonetheless controlling.¹⁰ Thus in any of its implications, this case falls within the literal scope and the purposes of the Act.

Petitioner further contends that the Service's actions do not represent an effort to protect the revenues but an attempt to regulate the admissions policies of private universities. Under this line of argument, the Anti-

¹⁰ See n. 6, *supra*. Petitioner argues that the revenues will be unaffected by the loss of its § 501 (c) (3) status, since if petitioner loses its ruling letter, donors will simply redirect their gifts to organizations whose tax-exempt status is secure, thus obtaining the same § 170 (c) (2) charitable deductions they presently enjoy when they make contributions to petitioner. It follows, according to petitioner, that the Act's principal purpose of protecting the revenues is not threatened by an injunction preserving petitioner's § 501 (c) (3) status. Thus, the Act should be found inapplicable.

The argument is too speculative to be persuasive. It presumes that all donors who take § 170 (c) (2) deductions will desert petitioner if the ruling letter is withdrawn and that all such donors will make gifts in equivalent amounts to other tax-exempt organizations. We deem it unlikely that either premise is wholly true. To the extent that either premise is inaccurate, an injunction preserving petitioner's § 501 (c) (3) ruling letter will interrupt the assessment and collection of taxes.

Injunction Act is said to be inapplicable because the case does not truly involve taxes. We disagree.

The Service bases its present position with regard to the tax status of segregative private schools on its interpretation of the Code.¹¹ There is no evidence that that position does not represent a good-faith effort to enforce the technical requirements of the tax laws, and, without indicating a view as to whether the Service's interpretation is correct, we cannot say that its position has no legal basis or is unrelated to the protection of the revenues. The Act is therefore applicable. Petitioner's attribution of non-tax-related motives to the Service ignores the fact that petitioner has not shown that the Service's action is without an independent basis in the requirements of the Code. Moreover, petitioner's argument fails to give appropriate weight to *Bailey v. George*, 259 U. S. 16 (1922). In that case, the Court held that the Act blocked a pre-enforcement suit to enjoin the federal Child Labor Tax, although the tax was challenged as a regulatory measure beyond the taxing power of Congress. Significantly, the Court announced *Bailey v. George* on the same day that it issued *Bailey v. Drexel Furniture Co.*, 259 U. S. 20

¹¹ See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230. The question of whether a segregative private school qualifies under § 501 (c) (3) has not received plenary review in this Court, and we do not reach that question today. Such schools have been held not to qualify under § 501 (c) (3) in *Green v. Connally*, 330 F. Supp. 1150 (DC) (three-judge court), aff'd *per curiam sub nom. Coit v. Green*, 404 U. S. 997 (1971). As a defendant in *Green*, the Service initially took the position that segregative private schools were entitled to tax-exempt status under § 501 (c) (3), but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy.

(1922), a tax-refund case in which the Court struck down the Child Labor Tax as unconstitutional on the grounds that the taxpayer attempted to raise prematurely in *Bailey v. George*.¹²

Petitioner also argues that § 7421 (a) is not controlling because when the Act was passed in 1867 Congress could not possibly have foreseen something as sophisticated as the comparatively recent ruling-letter program¹³ and the special importance of that program for § 501 (c)(3) organizations. This argument proves too much, however, since the same Congress also could not have foreseen, for example, FICA or FUTA taxes, to which the prohibitory command of § 7421 (a) indisputably applies. See, e. g., *Williams Packing*, 370 U. S. 1 (1970). Moreover, through the years Congress has repeatedly re-enacted the Anti-Injunction Act¹⁴ at times when it was

¹² In support of its argument that this case does not involve a "tax" within the meaning of § 7421 (a), petitioner cites such cases as *Hill v. Wallace*, 259 U. S. 44 (1922) (tax on unregulated sales of commodities futures), and *Lipke v. Lederer*, 259 U. S. 557 (1922) (tax on unlawful sales of liquor). It is true that the Court in those cases drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. E. g., *Sonzinsky v. United States*, 300 U. S. 506, 513 (1937). Even if such distinctions have merit, it would not assist petitioner, since his challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which clearly are intended to raise revenue.

¹³ The currently prevailing ruling-letter program of the Service commenced in 1940, see Caplin, Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles, NYU 20th Inst. on Fed. Tax 1, 2, 4-5 (1962), although its formal announcement did not take place until 1953. Rev. Rul. 10, 1953-1 Cum. Bull. 488.

¹⁴ The most recent re-enactment, in the Internal Revenue Code of 1954, postdates both the actual and the formal commencement of the Service's ruling letter program for § 501 (c)(3) organizations. See n. 13, *supra*.

obviously aware of the continuously increasing complexity of the federal tax system.¹⁵

B

Petitioner next argues that *Enochs v. Williams Packing & Navigation Co.*, *supra*, does not constitute an all-encompassing reading of the Act. Petitioner contends, on the basis of prior precedents, that § 7421 (a) is subject to judicially created exceptions other than the "under no circumstances" test announced in *Williams Packing*. But the Court's unanimous opinion in *Williams Packing* indicates that the case was meant to be the capstone to judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose.

During the first half century of the Act's existence, the Court gave it literal force, without regard to the character of the tax, the nature of the pre-enforcement challenge to it, or the status of the plaintiff. See *State Railroad Tax Cases*, 92 U. S., at 613-614; *Snyder v. Marks*, 109 U. S. 189 (1883); *Pacific Steam Whaling Co. v. United States*, 187 U. S. 447 (1903); *Dodge v. Osborn*, 240 U. S. 118 (1916); *Bailey v. George*, 259 U. S. 16 (1922).¹⁶ Occasionally, however, the Court noted in

¹⁵ In addition to repeatedly re-enacting the Anti-Injunction Act, Congress reaffirmed the Act's purpose by adding the federal tax exception to the Declaratory Judgment Act. See n. 7, *supra*.

¹⁶ The Anti-Injunction Act was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were inadequate. *E. g.*, *Dows v. City of Chicago*, 11 Wall. 108, 109-110 (1871); *Shelton v. Platt*, 139 U. S. 591 (1891); *Pittsburgh & C. R. Co. v. Bd. of Pub. Works*, 172 U. S. 32 (1898). See

dictum that unspecified extraordinary and exceptional circumstances might justify an injunction despite the Act. *E. g.*, *Dodge v. Osborn*, *supra*, at 122; *Bailey v. George*, *supra*, at 20. In 1922, the Court seized upon these dicta and permitted pre-enforcement injunctive suits against tax statutes that were viewed as penalties or as adjuncts to the criminal law. *Hill v. Wallace*, 259 U. S. 44 (1922); *Lipke v. Lederer*, 259 U. S. 557 (1922); *Regal Drug Corp. v. Wardell*, 260 U. S. 386 (1922). Shortly thereafter, however, the Court made clear that *Hill*, *Lipke*, and *Regal Drug* were of narrow scope and had no application to pre-enforcement challenges to truly revenue-raising tax statutes. *Graham v. Du Pont*, 262 U. S. 234 (1923).¹⁷ Thus, the Court's first departure from a literal reading of the Act produced a prompt correction in course.

California v. Latimer, 305 U. S. 255, 261-262 (1938) (Brandeis, J., for a unanimous Court):

"[The delay inherent in pursuing remedies at law], it is urged, is a special circumstance which justifies resort to a suit for an injunction in order that the question of liability may be promptly determined. If the delay incident to such proceedings justified refusal to pay a tax, the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal, could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a federal tax." (Footnote omitted.)

Since equitable principles militating against the issuance of federal injunctions in tax cases existed independently of the Anti-Injunction Act, it is most unlikely that Congress would have chosen the stringent language of the Act if its purpose was merely to restate existing law and not to compel litigants to make use solely of the avenues of review opened by Congress. For this reason, it is not surprising that the early cases interpreting the Act read it at face value.

¹⁷ As noted earlier, the Court has also abandoned the view that bright-line distinctions exist between regulatory and revenue-raising taxes. See n. 12, *supra*.

In the 1930's the Court decided *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498 (1932), and *Allen v. Regents of the University System of Georgia*, 304 U. S. 439 (1938), the cases relied on most heavily by petitioner. *Standard Nut* set forth a new definition of the extraordinary and exceptional circumstances test, which was followed in *Regents*. In *Standard Nut* the Court stated that the Act is merely "declaratory of the principle" of cases prior to its passage that equity usually, but not always, disavows interference with tax collection; thus, the Act was to be construed "as near as may be in harmony with [equity doctrine] and the reasons upon which it rests." 284 U. S., at 509. Through this interpretation, the concept of extraordinary and exceptional circumstances was reduced to the traditional equitable requirements for issuance of an injunction.

Standard Nut was such a significant deviation from precedent that it was referred to by a commentator at the time as "a tribute to the tenacity of the American taxpayer" and "little short of phenomenal."¹⁸ Read literally, the Court's opinion effectively repealed the Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the Act's passage. The incongruity of this position has not escaped notice.¹⁹ It undoubtedly led directly to the Court's re-

¹⁸ Gorovitz, *Federal Tax Injunctions and the Standard Nut Cases*, 10 *Taxes* 446 (1932). Mr. Justice Stone, joined in dissent by Mr. Justice Brandeis, underlined the tension between *Standard Nut* and prior precedent: "Enacted in 1867, [the Anti-Injunction Act], for more than sixty years, has been consistently applied as precluding relief, whatever the equities alleged." 284 U. S. 498, 511.

¹⁹ *E. g.*, Lenoir, *Congressional Control Over Suits to Restrain the Assessment or Collection of Federal Taxes*, 3 *Ariz. L. Rev.* 177, 195 (1961).

"In effect [*Standard Nut*] says that if special circumstances exist which bring the case within some acknowledged head of equity juris-

examination of the requirements of the Act in *Williams Packing*, the second time the Court has undertaken to rehabilitate the Act following debilitating departures from its explicit language. See *Graham v. Du Pont*, *supra*.

Williams Packing switched the focus of the extraordinary and exceptional circumstances test from a showing of the degree of harm to the plaintiff absent an injunction to the requirement that it be established that the Service's action is plainly without a legal basis. The Court in essence read *Standard Nut* not as an instance of irreparable injury but as a case where the Service had no chance of success on the merits. 370 U. S., at 7. And the Court explicitly held that the Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise." *Id.*, at 6. Yet petitioner's argument that we should find *Williams Packing* inapplicable turns, in the last analysis, on its claim that to do otherwise would subject it to great harm. The Court rejected that consideration in *Williams Packing* itself, and we reject it as a reason for finding that case not controlling. Under the language of the Act, the degree of harm is not a factor, and as a matter of judicial construction, it does not provide a meaningful stopping point between *Standard Nut* and *Williams Packing*. Acceptance of petitioner's irreparable injury argument would simply

diction, [the Anti-Injunction Act] does not apply, and the Court may issue an injunction. But in the absence of such circumstances the Court will lack equity jurisdiction because there will be no basis for such jurisdiction. To say that [the Act] applies only in such cases seems a little absurd. It is tantamount to saying that [the Act] forbids the courts to issue injunctions only when they would not have the authority to issue them anyway! It denies any force whatever to [the Act] except as declaratory of an equitable rule previously followed by the courts."

revive the evisceration of the Act inherent in *Standard Nut*.

C

Assuming, *arguendo*, the applicability of § 7421 (a) and *Williams Packing*, petitioner contends that forcing it to meet the standards of those authorities will deny it due process of law in light of the irreparable injury it will suffer pending resort to alternative procedures for review and of the alleged inadequacies of those remedies at law. The Court dismissed out of hand similar contentions nearly 60 years ago,²⁰ and we find such arguments no more compelling now than then.

This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different. If, as alleged in its complaint, petitioner will have taxable income upon the withdrawal of its § 501 (c) (3) status, it may in accordance with prescribed procedures petition the Tax Court to review the assessment of income taxes. Alternatively, petitioner may pay income taxes, or, in their absence, an installment of FICA or FUTA taxes, exhaust the Service's internal refund procedures, and then bring suit for a refund. These review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status and withdrawal of advance assurance of deductibility. See, *e. g.*, *Christian Echoes National Ministry, Inc. v. United States*,

²⁰ See *Dodge v. Osborn*, 240 U. S. 118, 122 (1916):

"There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue after payment of the taxes and giving a right to sue in case of his refusal to refund are wanting in due process and therefore there is jurisdiction [to issue injunctive relief prior to the assessment or collection of any tax]. But we think it suffices to state that contention to demonstrate its entire want of merit."

725

Opinion of the Court

470 F. 2d 849 (CA10 1972), cert. denied, 414 U. S. 864 (1973); *Center on Corporate Responsibility, Inc. v. Shultz*, 368 F. Supp. 863 (DC 1973).²¹

We do not say that these avenues of review are the best that can be devised. They present serious problems of delay, during which the flow of donations to an organization will be impaired and in some cases perhaps even terminated. But, as the Service notes, some delay may be an inevitable consequence of the fact that disputes between the Service and a party challenging the Service's actions are not susceptible of instant resolution through litigation. And although the congressional restriction to postenforcement review may place an organization claiming tax-exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference, *e. g.*, *Cheatham v. United States*, 92 U. S., at 88-89; *State*

²¹ Because of the availability of FICA and FUTA refund actions, we need not address the adequacy of another possible means of seeking postenforcement judicial review—the “friendly donor” refund suit. Under this approach, there must be a donor willing to file a refund action claiming a § 170 (c) (2) charitable deduction for a contribution to an organization after the Service has revoked the organization's ruling letter and withdrawn advance assurance of deductibility. To utilize this approach, the organization must first be able to find a donor willing to subject himself to the rigors of litigation against the Service and then must rely on the donor to present the relevant arguments on the organization's behalf. These and other possible differences between a donor refund suit and an action brought directly by an organization leave open the question whether a donor's refund suit constitutes an adequate legal remedy for correcting illegal actions on the part of the Service. We reserve this question for a case that turns upon its resolution.

Railroad Tax Cases, 92 U. S., at 613-614, and of the opportunities for review that are available.²²

IV

Since we hold that *Williams Packing, supra*, governs this case, the remaining issue is whether petitioner has met the standards of that case. Without deciding the

²² Petitioner did not bring this case as a refund action. Accordingly, we have no occasion to decide whether the Service is correct in asserting that a district court may not issue an injunction in such a suit, but is restricted in any tax case to the issuance of money judgments against the United States. Brief for Respondents 37 n. 35. We note, however, that the Service's position with regard to the range of relief available in a refund suit raises several considerations not presented by a pre-enforcement suit for an injunction. For example, it may be possible to conclude that a suit for a refund is not "for the purpose of restraining the assessment or collection of any tax . . .," and thus that neither the literal terms nor the principal purpose of § 7421 (a) is applicable. Moreover, such a suit obviously does not clash with what the Court referred to in *Williams Packing, supra*, as a "collateral objective of the Act—protection of the collector from litigation pending a suit for refund." 370 U. S., at 7-8. And there would be serious question about the reasonableness of a system that forced a § 501 (c) (3) organization to bring a series of backward-looking refund suits in order to establish repeatedly the legality of its claim to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress.

The Service indicates that "its normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit." Brief for Respondents 35 n. 31. When the Service adheres to that position following a refund suit decided in favor of the plaintiff, there is of course little likelihood that injunctive relief would be necessary or appropriate. But our decision today that § 7421 (a) bars pre-enforcement injunctive suits by organizations claiming § 501 (c) (3) status unless the standards of *Williams Packing* are met should not be interpreted as deciding whether injunctive relief is possible in a refund suit in a district court.

merits, we think that petitioner's First Amendment, due process, and equal protection contentions are sufficiently debatable to foreclose any notion that "under no circumstances could the Government ultimately prevail . . ." 370 U. S., at 7. See, e. g., *Green v. Connally*, 330 F. Supp. 1150 (DC), *aff'd per curiam sub nom. Coit v. Green*, 404 U. S. 997 (1971). Accordingly, the Court of Appeals did not err in holding that § 7421 (a) deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought.

In holding that § 7421 (a) blocks the present suit, we are not unaware that Congress has imposed an especially harsh regime on § 501 (c)(3) organizations threatened with loss of tax-exempt status and with withdrawal of advance assurance of deductibility of contributions. A former Commissioner of the Internal Revenue Service has sharply criticized the system applicable to such organizations.²³ The degree of bureaucratic control

²³ See Thrower, *IRS Is Considering Far Reaching Changes in Ruling on Exempt Organizations*, 34 J. Taxation 168 (1971):

"There is no practical possibility of quick judicial appeal at the present. If we deny tax exemption or the benefit to the organization of its donors having the assurance of deductibility of contributions, the organization must either create net taxable income or other tax liability for itself as a litigable issue, or find a donor who as a guinea pig is willing to make a contribution, have it disallowed, and litigate the disallowance. Assuming the readiness of the organization or donor to litigate, the issue under the best of circumstances could hardly come before a court until at least a year after the tax year in which the issue arises. Ordinarily, it would take much longer for the case of the organization's status to be tried. . . . While all of this time is passing, the organization is dormant for lack of contributions and those otherwise interested in its program lose their interest and move on to other organizations blessed with the Internal Revenue Service imprimatur; and the right to judicial review is not pursued.

"This is an extremely unfortunate situation for several reasons. First, it offends my sense of justice for undue delay to be imposed

BLACKMUN, J., concurring in result

416 U.S.

that, practically speaking, has been placed in the Service over those in petitioner's position is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities. Specific treatment of not-for-profit organizations to allow them to seek pre-enforcement review may well merit consideration. But this matter is for Congress, which is the appropriate body to weigh the relevant, policy-laden considerations, such as the harshness of the present law, the consequences of an unjustified revocation of § 501 (c)(3) status, the number of organizations in any year threatened with such revocation, the comparability of those organizations to others which rely on the Service's ruling-letter program, and the litigation burden on the Service and the effect on the assessment and collection of federal taxes if the law were to be changed.

The judgment is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the decision of this case.

MR. JUSTICE BLACKMUN, concurring in the result.

I concur in the Court's judgment and agree with much of the reasoning in its opinion for this case. As the Court notes, *ante*, at 738, the University's obtaining an injunction would directly prevent the collection of what it says are \$750,000 in income tax for 1971 and of over \$500,000 for 1972. On the basis of this fact alone, the "purpose" of the suit is indeed to restrain "the

on one who needs a prompt decision. Second, in practical effect it gives a greater finality to IRS decisions than we would want or Congress intended. Third, it inhibits the growth of a body of case law interpretative of the exempt organization provisions that could guide the IRS in its further deliberations."

725

BLACKMUN, J., concurring in result

assessment or collection of [a] tax," and brings 26 U. S. C. § 7421 (a) into play.

Since the anti-injunction statute is applicable, we must consider whether the University comes within the statute's exception recognized in *Enochs v. Williams Packing & Navigation Co.*, 370 U. S. 1 (1962). As to this, I join Part IV of the Court's opinion to the effect that it has not been shown that "under no circumstances could the Government ultimately prevail." *Id.*, at 7.